THEORIA

EDITED BY ÅKE PETZÄLL

"The Right to Punish"

Published under the auspicies of the UNESCO and *Institut International de Philosophie* on the occasion of the Xth International Congress of Philosophy, Amsterdam, August 1948

With contributions by:

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Volume XIV 1948 Part II

C. W. K. GLEERUP
Lund

EJNAR MUNKSGAARD
Copenhagen

THEORIA

A Swedish Journal of Philosophy and Psychology

VOLUME XIV 1948 PART II

Annual subscription (3 parts) 8,50 Swed. Kr. Single parts 3,25 Sw. Kr.

Orders may be sent to all booksellers or to the publishers, Messrs. C. W. K. Gleerup, Vårfrugatan 8, Lund, Sweden, or Messrs. Ejnar Munksgaard, Nørregade 6, Copenhagen K., Denmark.

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Contents:

Manuscripts for the 1st number of the annual volume should be sent to the editor on December 1st of the preceding year, for the 2nd number on April 1st, for the 3rd number on September 1st *latest.*

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"The Right to Punish".

The subject, which has been proposed by UNESCO for discussion in this number of Theoria has been previously touched upon in different connections in this periodical. It may be said that world events and the present crisis in the Law system has made the subject actual and that old problems must be taken up afresh by reason of the measures adopted during and after the latest world war.

Theoria has gratefully accepted the invitation, issued by UNESCO, and we have invited some prominent legal authorities and criminologists to make their contribution to the proposed subject. Theoria, however, does not propose here to offer its readers a »symposium», in which the proposed theme is discussed from different points of view according to a certain plan. The problem of the »right» to punish is not a clearly defined question to modern jurists, criminologists and philosophers. The empiric investigation of the causes of crime and of the effective means of combating it has pushed into the background the old fundamental problem of the legal basis of punishment and the philosophical question of its moral justification.

This is connected with an obvious change in opinion concerning the »meaning» of punishment. The far-reaching discussion about the task of punishment could be broadly summarized as an opposition between two different opinions, which may be characterized as the theory of retribution and the theory of prevention. The theory of retribution sees the aim of punishment in the punishing of a crime by a suffering, which is in proportion to the harm caused, and the punishment finds its aim in

itself by outweighing the guilt. The theory of prevention sees in punishment a means of bringing about an elimination of the injurious effects of crime. The two theories cannot be clearly distinguished in debate. They show tendencies to overlap. The difference between them would appear most striking, if one sees them from the point of view of determination of guilt in the juridical meaning. They who support the retribution standpoint generally mean that the guilt consists of an obligation to make good the injury, which has been committed by attack on a value, a social order or a settled system. As regards the theory of prevention, however, the guilt is »danger to the community», which consists of an asocial turn of mind. In the former conception punishment is the application of suffering, corresponding to the gravity of the guilt, and its justification is seen against the background of the existing guilt. The latter conception interests itself above all in the elimination of the »danger to the community». In the latter case the dominating interest lies in the understanding of the genesis of the crime and the preventive measures. Here the problem of whether we have the »right to punish» is of secondary importance. The more the measures for punishment are replaced in the legislation by protective measures, the less interest is devoted to attempts at finding a fundamental justification for intervention.

In an earlier number of Theoria (Vol. XIII, 1947) I have briefly characterized the principles, which have been decisive for the development of criminal legislation in Sweden during the last few years. I quoted the chairman of the Swedish Penal Code Commission, who maintains that the reforms within the penal code theoretically can be said to have been an attempt to get away from the idea that the task of criminal legislation ought to be to inflict on the culprit a chastisement proportional to a moral debt, and instead to make the chief point the protection of the community against the menacing danger of the criminal. Juridical-philosophical speculations have given place to prophylactic and therapeutic points of view, based on social and medical arguments.

The matter can also be expressed thus, that it is no longer a question of finding basic reasons for the community's right to punish. Attention has been drawn instead to the community's obligation to prevent such a development in the individual that through him the general safety and welfare are exposed to danger.

However, both in Sweden as well as in several other countries the present work of revision has given rise to a discussion on the social function of punishment, in which the question once again has been raised about »the right to punish». In the above-mentioned article in Theoria I ventured to suggest an international discussion concerning the problem of the social function of punishment. The question is of such a character that it ought to be treated not only from different scientific quarters, but also from different geographical ones. On the whole the question of the social task of punishment must be treated on a broad basis and from as many points of view as possible.

The editors of Theoria, therefore, hope that UNESCO's initiative, which we have gratefully followed, will give rise to fruitful discussion. I also venture to express the hope that the contributions made here will become the subject of further exchanges of opinion in Theoria.

Finally I take the liberty of saying that I am deeply indebted to UNESCO not only as editor of Theoria but also as founder of *Institut International de Philosophie* for valuable support in international philosophical collaboration of which this issue of Theoria may serve as a token of gratitude.

Åke Petzäll.

Le Droit de Punir.

Par

Etienne De Greeff.
(Louvain)

Cet homme abstrait, auquel s'en prennent le Code et l'appareil de la Justice, cet homme abstrait, doué d'une pure intention malveillante et de qui la volonté est hostile et coupable et n'est que cela, est une survivance, dans la vie adulte, de l'intentionalisme infantile, en fonction duquel l'enfant projette une intention simple en tout ce qui agit et se meut, en tout ce qui blesse. La réalité oblige l'enfant, à mesure qu'il grandit, à réduire spontanément ces conceptions basées uniquement sur l'instinct de défense et à supprimer les intentions chez les corps inertes, les meubles, les plantes, les astres et, partiellement, chez les animaux. Mais pour ce qui concerne l'homme cette réduction spontanée n'a pas lieu et cette attitude intentionaliste infantile persiste quasi telle quelle dans la vie des sociétés. Cette réduction ne se fait pas, d'une part, parce qu'elle a contre elle des apparences sommaires et, d'autre part, parce qu'intentionalisme est synonyme de responsabilité et que l'idée de responsabilité constitue le point d'appui par lequel la collectivité a prise sur l'individu. Du point de vue psychologique, philosophique, littéraire et biologique une telle conception simpliste du comportement humain est rejetée par les hommes qui pensent; elle ne subsiste que dans la littérature de guignol. Si bien que la mentalité répressive est en opposition grave avec la pensée différenciée. Déterministe ou spiritualiste, l'homme qui réfléchit ne saurait admettre le droit de punir, la mentalité répressive tels qu'ils

existent. Car ce droit pour s'exercer doit commencer par nier toute valeur, toute dignité et toute complexité humaines et ne peut se manifester que comme »*pouvoir*» de punir, expression de force, expression d'agression. Les forces morales qu'on dit être en jeu à propos de ce droit de punir sont singulièrement suspectes si elles ne peuvent être protégées que par des conceptions aussi déficientes.

Il est clair pourtant que la société a le droit de se défendre ou du moins de défendre les individus dans leurs droits essentiels. Mais ce droit ne peut s'exercer que dans les limites de la défense, par des méthodes qui tiennent compte de toute la personnalité et non inféodées à un concept infantile de la responsabilité.

A ce point de vue là, il existe chez l'homme un sentiment latent de culpabilité, normalement liée à la vie morale et au sentiment subjectif de responsabilité (lequel fonctionne aussi bien chez l'aliéné que chez l'homme normal d'ailleurs) et par l'intermédiaire duquel, à propos de certains actes, une intervention d'allure réparatrice, voire justicière, devient acceptable pour l'individu.

Mais ce sentiment de culpabilité latente chez l'individu n'implique pas que celui-ci consente à se laisser traiter comme une abstraction. Il postule une justice vraie, qui n'est possible que dans l'acte de compréhension sympathique, la seule qui puisse tenir compte de la personnalité réelle et qui situe à sa place l'acte répréhensible. C'est cette compréhension sympathique que l'agression punitive inhibe, refusant de voir l'homme et de traiter avec lui. A l'heure actuelle sous le couvert de l'étude scientifique envisageant les attitudes internes du sujet, ses nuances, sa complexité, ses polyvalences foncières, ses constantes biologiques, un tel accès sympathique de la personnalité humaine est possible. Et la Défense Sociale, évoluant dans ce sens, peut fort bien remplacer le concept infantile du droit unilatéral de punir.

The Primary Reason for Punishment[1].

By

A. C. Ewing.
(Cambridge)

There can be no doubt that the retributive theory of punishment, i. e. the theory that the suffering of the guilty is an end-in-itself to be inflicted just because it is deserved by a past act, is the one which presents itself most naturally to the human mind, but this does not prove its correctness. Retribution cannot be the chief reason for punishment, since even if retributive justice is of some value in itself, the moral improvement of the transgressor surely has a very much greater value. Further, if the retributive principle is accepted at all as fixing our goal in punishment, it obviously cannot be retributively just to do anything else but strive after a strict proportion between happiness and goodness, suffering and badness. But such a goal is quite beyond the compass of the State, and any attempt towards it is likely to do more retributive injustice than justice. Finally, even a very moderately retributive theory is, I think, refuted by the fact that one ought not to feel pleasure at the sufferings of anyone, even a very bad criminal. If the pain of punishment were an end-in-itself in any degree, it would be perfectly fitting and right to rejoice in it for its own sake, and this is not the case.

Yet the ordinary utilitarian theory is also open to objection

[1] I am indebted to Messrs. Kegan Paul, Trench, Trubner & Co for giving me permission to use my book, *The Morality of Punishment*, published by them, in writing this article.

because it does not do justice to the intrinsic connection between punishment and past wrong-doing. Suppose the man guilty of a given offence could not be found but there was another man generally supposed guilty. Suppose, further, that psychological experts were convinced that the character of the latter would benefit by a spell of imprisonment. In that case why not imprison him? The deterrent and reformatory effects would be good, and though the innocent man would suffer there is no reason to suppose that he would suffer more than a guilty man, and therefore no reason to suppose that his punishment would cause more pain than the normal punishment of the guilty which is generally approved. Can the utilitarian theory explain why it is a crying outrage to act in this way? And can it give any adequate account of what is meant by justice and desert? A »deserved punishment» certainly does not just mean one which is productive of the greatest good. On a utilitarian theory would it not be *per se* as satisfactory to punish the innocent as the guilty, and only at the most incidentally unsatisfactory because it would usually happen to produce unfortunate results?

I think the answer to these questions and the chief clue to a satisfactory theory of punishment is to be found in the conception of punishment as a way of telling the offender emphatically that he has done wrong. Why is it that criminals act wrongly? Not usually because they do not know they are acting wrongly, but because, though they know that what they are doing is wrong, they are not conscious of its wrongness vividly enough to overcome the desire to do it. Punishment is an attempt to make them realize it more vividly by expressing disapproval more forcibly than mere words could express it. I am sceptical as to whether many criminals are reformed by punishment [1], but this is how it should work reform, if it does so at all. Further, punishment

[1] One must destinguish between being reformed while being punished and being reformed by the punishment. If a man is converted by the influence of the prison chaplain or given a new and decisively beneficial interest in life by education in prison, he is refomed by something which happened while he was being punished, not by the punishment (pain) as such.

is not merely a matter for the state and the criminal law, and what I have mentioned is certainly the main purpose of punishment in education. It is generally conceded that here the retributive aim should play hardly any part, and it is clear that punishments are usually intended for the benefit of the child punished himself, not mainly to deter other children from committing a like offence. The chief object of punishment of children »is to get them out of bad habits». I admit that it is not the most important or beneficial means available to this end, but it may be needed to supplement others.

The notion of punishment as the expression of condemnation of wrongdoing is also presupposed if punishment is to have an adequate deterent effect without brutal severity. A chief reason why imprisonment deters most people is because it is viewed as such a disgrace, i. e. it suggests that the person punished has acted sufficiently badly to be put in a class of people who are set aside from ordinary society as specially evil. It is this feature also which distinguishes punishment from other cases of the infliction of harm or inconvenience on people as a means to the general good, e. g. quarantine, taxes, compulsory inoculation.

If punishment is essentially an expression of moral condemnation, this makes clear why it has an essential connection with previous wrongdoing. It is not any and every sort of harm, but harm inflicted because of wrongdoing on the part of its victim. I think a large part of the evil involved in the punishment of the innocent lies in the fact that it involves pretending they are guilty, i. e. it is an acted lie of a particularly vile nature. Further, the theory explains why the punishment should be proportionate to the offence. To punish slighter offences worse than graver is to say the former are graver and thus, in so far as it lies in the power of the penal system, to tend to pervert the moral standards of the community in this respect. This does not mean that we can discern a fixed mathematical proportion between a crime and its rightful punishment. Punishment may be regarded as a language conveying disapproval, and the relative degree of disapproval expressed by a particular kind of punishment will

not be fixed by the ultimate nature of things but will depend on the state of civilization and ideas of the community. We must not say: — »Punishment expresses disapproval of wrongdoing. Therefore the more we disapprove of wrongdoing the more severely we shall punish», but — »Such a crude way of expressing disapproval as punishment is only necessary because of much insensitivity to moral obligations. Therefore the severer the punishments we have to inflict the lower the moral rank of the community, and the more grossly our other means of education have failed so as to leave people in need of such severity». As a matter of fact gross severity will destroy any moral value there is in the punishment by averting attention from the offender's wrongdoing to his sufferings and by making him and others feel that he is more sinned against than sinning.

It seems to me that the feeling that a punishment is deserved or undeserved, on which feeling the retributive theory has been based, is linked up with the sense that it is or is not a fitting expression of disapproval. This feeling depends at least as much on the kind of punishment inflicted as on its degree, a point which the retributive theory does not explain. A punishment is particularly fitting if it can be seen to spring from the nature of the crime, e. g. if the criminal himself falls into the trap which he has set for other men. It was a more fitting punishment for Hitler to see Germany lose the war which he had brought on than it would have been for him to die in agony from cancer while Germany was still victorious, whether or not the bodily pain of the cancer would have exceeded in degree the mental pain which he actually suffered. It is more fitting because it symbolizes better the condemnation of his particular crimes. It would be a more appropriate punishment for theft to make the thief do work in prison (or, if not sent to prison, in his spare time) for the benefit of the person he had robbed till he had compensated the latter for his loss than to give him a flogging or sentence him to a spell in prison which, as usual to-day, included no tasks of special relevance to his offence and its victim.

Such an obviously appropriate kind of punishment the thief would be less unlikely not to resent.

I do not necessarily deny that the act of punishing as a whole may be regarded as in some slight degree of intrinsic value, but this is at any rate altogether outweighed in importance for good or evil by its consequences. There may be something intrinsically good about the fitting expression of disapproval, but the expression is not fitting unless it may reasonably be anticipated to have good consequences. Consequences I should regard as practically the sole criterion whether and how much to punish the guilty, but where the retributive theory is right is in insisting on the intrinsic evil of punishing the innocent. Further, I emphatically reject the view that the pain of the punishment is good-in-itself. This is not a mere academic point of difference, too slight to be of any practical importance. For, if we think that the pain is an end-in-itself, the presumption in doubtful cases will be in favour of inflicting it where it seems deserved; if we recognise that it is *per se*, like all pain, an evil, the presumption will be against inflicting it. No doubt moral condemnation, if adequately appreciated by its victim, will always give him pain; but if it can serve its purpose without the special infliction of an external, extra pain, so much the better. There is then no point in inflicting the pain. It is easy to imagine a society in which the mere verbal expression of disapproval without further penalty was as effective in checking crimes as penalties are to-day; and this is indeed the case already as regards the attitude to criminal offences of the more »respectable» classes. If such a state were reached, then any punishment over and above blame would be, in general, gratuitous cruelty.

At the same time, while I recognise that punishment has some place in the administration of law and in education, I certainly do not wish to maintain that it should play anything but a minor role. Punishment is not the only or the main way of preventing crime, and still more certainly not the best. Of much more importance for this purpose are psychotherapy, moral education in childhood, welfare work, and social reform. In education itself

the importance of punishment has been grossly exaggerated in the past because it is the simplest method, the first refuge of a lazy educator. To educate without lavish use of punishment requires much more personality, much more thought. But it is a commonplace that the bad effects of an excessive use of punishment have been revealed by modern psychology.

An especial drawback about state punishment for crime is that, excluding minor fines, which are not generally regarded as of moral significance, though perhaps they ought to be, none or hardly any have been devised which are not liable to bring with them various collateral evils of a serious kind such as to endanger the moral development of their victim. This is chiefly because, since they are concerned with grave crimes, they involve such disgrace as to overshoot their mark, and express disapproval to such an extent as to shatter or undermine the self-respect of their victims and convey the suggestion that the latter are members of a specially wicked class, which may actually lead to their acting as such. Prison reformers have commonly found that their own first task must be to take special measures to counteract the effects of the punishment and restore the prisoners' self-respect. I should therefore hesitate very much before recommending the punishments of the criminal law on the ground of their reformatory value, though some seem necessary as deterrent. And, the more we can do without them, emphatically the better.

Le Droit de Punir.

Par

Olof Kinberg.
(Stockholm.)

Depuis des siècles la philosophie du droit a cherché une réponse à la question: de quel droit la société humaine inflige-t-elle des peines, même la plus définitive de toutes, celle de la mort, aux citoyens qui ont commis des infractions aux lois pénales? A cette question le droit pénal de presque tous les pays de civilisation occidentale a répondu que tout individu sain d'esprit et arrivé à l'âge adulte (dans certains pays quinze ans, dans d'autres moins encore) possède le libre arbitre, c'est à dire la liberté de choisir ses actions ce qui implique qu'il est »responsable» (»imputable», »zurechnungsfähig»), de ses actes. Seulement, être imputable équivaut à être moralement responsable de ses actes. Donc, l'homme qui commet un crime encourt par ce fait même une »dette morale» qu'il doit racheter en subissant la peine que prescrivent les lois du pays où il a commis le crime. Ainsi c'est en contractant cette »dette morale» que le criminel donne à la société le droit de lui infliger la peine.

Pourtant les éléments de cette théorie sont des concepts qui manquent de base empirique. Déjà le concept fondamental de cette théorie théologico-métaphysique, le libre arbitre, est une notion vide et sans appui empirique. Même la conception de la »volonté» est une hypostase. C'est que la psychologie empirique ne connaît pas de »force psychique» qui pourrait être regardée comme le contenu de la notion de »volonté». Ce qui existe réellement sont des activités psycho-nerveuses possédant parfois un

caractère conatif prononcé qui est éprouvé comme une volition, mais ce que nous appelons volition n'est qu'un composant d'une activité bio-psychologique unie. Ce composant peut être isolé par un procédé analytique, mais il n'est jamais qu'un élément d'une activité totale. Donc, pour la psychologie empirique, la »volonté» considérée comme une »force psychique» persistante et dirigeante les réactions de l'homme, est une fiction philosophique. De plus, nombre des comportements humains, peut-être la plupart d'entre eux, se produisent sans que le sujet éprouve des volitions, puisque bien des réactions bio-psychologiques sont des reflexes composés et exécutés souvent plus ou moins inconsciemment.

La théorie de l'»imputabilité» de l'ancienne philosophie du droit a été l'objet d'une critique destructive de la part des criminologues modernes. Ici il faut d'abord nommer Enrico Ferri. Après lui nombre de médecins et de juristes ont essayé de donner un contenu empirique à la notion d'»imputabilité». Cependant tous ces essais ont mené à des contradictions théoriques. Aussi du point de vue pratique manquent-ils de valeur [1].

Dans les travaux que je me suis permis de citer, il a été démontré que, quand-même il serait possible d'établir une notion d'»imputabilité» théoriquement acceptable, elle serait sans utilité pratique, vu l'impossibilité de constater empiriquement un état psychologique d'»imputabilité».

C'est pourquoi dans la politique criminelle de Suède on a cessé d'indiquer au moyen des notions d'»imputabilité» ou de »responsabilité» quels criminels doivent être exempts de punitions. Au lieu de cela, c'est l'état mental de l'accusé et le besoin d'un traitement médical qui décident en principe s'il doit être déclaré exempt de punition ou non.

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[1] *Enrico Ferri*: Teoria dell' imputabilità e negazione del libero arbitrio, 1878. *O. Kinberg*: Ueber die Unzulänglichkeit aller Versuche einen Begriff der Zurechnungsfähigkeit aufzustellen (Monatsschrift f. Krim. psych. u. Strafrechtsreform, 1911). — Om den s. k. tillräkneligheten (De la soi-disante imputabilité). — Basic Problems of Criminology, 1935. — Will a Concept of Imputability be of Practical Use in a Penal System founded on Empirical Psychology? (The British Journal of Medical Psychology, 1941).

Au cours de la discussion sur ces questions, l'attitude anti-métaphysique de la psychiatrie juridique suédoise a amené que le concept même de la punition a été mis sous débat.

En Suède le nombre des cas où les tribunaux ordonnent un examen mental des accusés a beaucoup augmenté pendant le dernier demi-siècle. Ainsi, tandis que le nombre des examinés n'était qu'environ 60 par an au commencement du siècle, il est à présent environ 1500, ce qui veut dire qu'un accusé pour crime sur cinq est examiné au point de vue mental. Dans les années 1930—40 surtout, un grand nombre de ces examinés furent exemptés de punition. Grâce à des méthodes de diagnostic perfectionnées, les experts de psychiatrie juridique sont maintenant à même de constater des troubles mentaux dans beaucoup de cas où les profanes ne voient que des individus amoraux et criminels. Une campagne de presse peu initiée fit écho au Riksdag, où elle donna naissance à l'opinion que trop d'accusés étaient exemptés de punition à cause de troubles mentaux. La question fut même considerée de telle importance qu'elle fit l'objet d'une enquête Gallup. Il n'est pas facile d'imaginer une méthode moins propre à apporter une réponse à une question de ce genre, à moins que ce ne soit pour en voiler la vraie portée afin de créer un semblant d'opinion publique sur un fond incertain. Puis, affirmer que trop de criminels sont exemptés de punition (déclarés »irresponsables» selon le terme français courant) équivaut à soutenir que trop de criminels sont des malades mentaux ou des anormaux. Une telle affirmation est dépourvue de sens.

D'ailleurs, il est trés facile de montrer que des aliénés souvent très dangereux et qui ont été condamnés à des peines fixées plus ou moins courtes commettent souvent des crimes très graves après leur libération. Ainsi, il y a quelques années, un homme souffrant de schizophrénie fut condamné à une peine fixée assez courte. Dans la prison il parlait de ses proches d'une manière si haineuse et si menaçante que ceux-ci étaient persuadés de devenir l'objet d'une attaque meurtrière si l'homme était libéré à la fin de la peine. Ils présentèrent aux autorités pénitentiaires une requête pour que l'homme fût placé dans un asile après la

fin de la peine, requête qui pourtant fut refusée. La peine finie, l'homme retourna à son lieu de domicile, et après un court délai il tua deux de ses proches, faillit tuer son demi-frère, blessa sérieusement deux autres personnes et finit par se suicider. Des exemples de ce genre pourraient être multipliés.

L'assertion que trop de criminels sont confiés à l'assistance des aliénés au lieu d'être punis se rapporte avant tout au soi-disant »psychopathes». Pour étayer cette assertion on a d'abord allégué les anciennes notions de vengeance et de rétribution. Les »psychopathes», dit-on, ne sont pas des malades mentaux mais des gens déformés au point de vue psychique et cette déformation se manifeste surtout comme des déficiences morales et sociales. Ce sont donc des gens mauvais et qui commettent des actions mauvaises. Mais ceux qui font du mal doivent souffrir du mal. Partant, il faut punir les »psychopathes» au lieu de les »choyer» en leur appliquant un traitement médical, surtout, dit-on, puisque il n'y aurait pas de traitement médical susceptible d'être appliqué à ces gens. Si pourtant il y a un tel traitement il pourrait très bien être appliqué dans les sections affectées à l'assistance des aliénés dans les prisons.

Le deuxième argument est d'ordre pratique. Si les »psychopathes» sont exemptés de punition, il faut les soigner dans les asiles ordinaires, puisqu'il n'y a pas d'établissements spéciaux pour eux, sinon les »établissements de sûreté», affectés aux criminels anormaux dangereux. Mais les asiles d'aliénés sont surchargés de malades qui ont besoin d'un traitement médical et parmi ceux-ci se trouvent nombre de personnes qui ont commis des crimes. De plus les asiles manquent en général d'organisation propre au traitement des »psychopathes» qui sont en général lucides, ordonnés, et souvent intrigants, amoraux et difficiles. Donc, pourquoi ne pas laisser aux prisons le soin de s'en occuper?

Au premier argument on peut objecter que la »psychopathie» est un diagnostic faute de mieux, un terme sans contenu déterminé et couvrant un grand nombre d'états pathologiques très différents: des vésanies non diagnostiquées, surtout peut-être des schizophrénies légères et pauvres en symptômes; des mentaux

dont les symptômes sont conditionnés par des lésions cérébrales d'ordre traumatiques, inflammatoires, allergiques etc.; des personnes dont la structure psychique montre des variantes plus ou des variantes minus des radicaux constitutionnels selon la psychologie individuelle et constitutionnelle de M. H. Sjöbring; des états d'insuffisance psychique provoqués par des conditions mésologiques nocives et qui frappent des personnes souffrant d'une vulnérabilité specifique du cerveau d'origine inconnue; des ixophrènes, enfin des personnes dont le développement bio-psychologique a été dévié à cause de dispositions maladives héréditaires.

Les quatre premiers groupes sont évidemment des états de maladie et par ce fait même ils doivent être traités par le médecin. Quand on veut faire valoir que le dernier groupe doit être traité d'une autre manière que les malades mentaux, cette assertion semble être fondée sur des idées purement superstitieuses. Les hommes ne choisissent librement ni lésions ni déformations héréditaires du cerveau. Par conséquent, lorsqu'il s'agit de juger quelle influence doit exercer la structure bio-psychologique des criminels sur leur traitement social, la provenance de cette structure est sans importance. Du reste, si des déficiences mentales causées par des déformations du cerveau et les manifestations de ces déficiences doivent être traitées par des peines, la logique exigerait que nombre d'obligophrènes dont les déficiences intellectuelles sont de la même origine soient aussi punis. Mais ceux qui luttent pour la punition des »psychopathes» ne consentent pas à tirer cette conclusion.

Le deuxième argument contre l'exemption de punition quant il s'agit de »psychopathes» criminels, à savoir qu'ils sont une lourde charge pour les asiles, est juste. Mais il est aussi valable à l'égard des aliénés criminels. Dans les asiles suédois il y a des sections d'hommes ou le nombre d'aliénés et de »psychopathes» criminels excède 20 pour cent. Evidemment, la présence d'un grand nombre de criminels dans les asiles est un handicap considérable dans leurs efforts d'obtenir la parité avec les autres hôpitaux. Pourtant, même s'il y a un besoin urgent de libérer les asiles du nombre toujours croissant d'aliénés et de »psycho-

pathes» criminels, il semble absurde d'en tirer la conclusion que certains d'entre eux doivent être relégués aux prisons.

Le problème: punition ou exemption de punition a une portée plus fondamentale. Selon l'école positiviste italienne, dont les protagonistes sont Lombroso, Ferri et Garofalo, la question de la responsabilité humaine doit être considérée d'un point de vue empirique et sociologique. Si l'on adopte cette manière de voir et si l'on écarte tous les éléments métaphysiques et théologiques inhérents depuis des siècles aux notions d'»imputabilité» et de »responsabilité», on arrive au concept d'une responsabilité sociale qui signifie que tout individu est responsable de tous ses actes dans la mesure où ils ont une importance sociale. De ce point de vue il est décevant de parler d'exemption de punition si par cette expression on donne à croire au public que la société renonce à se protéger contre certains criminels considérés comme »non-imputables» ou »irresponsables».

Pendant certaines phases de la civilisation humaine les aliénés et les obligophrènes avancés ont été tabou au point de vue pénal. Dans beaucoup de tribus primitives, la plupart des actes prohibés n'entraînent pas non plus de réaction publique.[1] Du temps de la civilisation antique, égyptienne et gréco-romaine, la manière d'envisager les aliénés et leur situation juridique était caractérisée par des tendances humanitaires et curatives. Aussi le principe que les aliénations mentales étaient des maladies de l'organisme exerçait-il une influence sur le traitement de ces états, influence qui disparut pourtant avec la civilisation antique. Au cours du moyen âge on perdit cette attitude éclairée envers les aliénés et on considéra leurs symptômes comme l'œuvre de mauvais esprits. Au lieu de les regarder comme des malades, on les traitait comme des pécheurs, des possédés, des impurs. Ils étaient enfermés dans des prisons, battus, torturés. Cette situation dura jusqu'à la fin du XVIII:e siècle.

Du point de vue juridique ils avaient perdu la protection que leur garantissaient les lois des anciens Romains. Au cours de la

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[1] *B. Malinowski*: Crime and Custom in Savage Society. 1926.

procédure criminelle, les maladies et anomalies mentales n'étaient prises en considération qu'en des cas extrêmes. Lorsque, au passage du XVIII:e au XIX:e siècle, s'ouvrit l'ère de la psychiatrie scientifique, l'état mental de l'accusé attira de plus en plus l'attention des médecins et des magistrats, et depuis une centaine d'années les malades mentaux et les oligrophrènes avancés sont, dans les pays de civilisation occidentale, toujours déclarés exempts de punition quand leur état est reconnu par le tribunal.

A mesure que le diagnostique psychiatrique s'est développé, la notion de maladie mentale s'est étendue. On a appris à mieux reconnaître des cas légers de certaines vésanies, surtout des schizophrénies. On a découvert de nouvelles formes de psychoses, jusqu'ici inconnues, comme les encéphalites de Sjöbring. On a constaté que nombre des cas diagnostiqués comme des »neurasthénies», des »hystéries», des »névroses traumatiques» etc. sont des maladies cérébrales lésionnelles et qui, quant à leur origine, équivalent à des vésanies. On a trouvé que nombre de »psychopathes», terme diagnostique aujourd'hui sur la langue de tout le monde, sont aussi des malades mentaux qu'il n'y a aucune raison de séparer des autres mentaux au point de vue du traitement social et médical.

Par tout cela la distance entre ce que le profane appelle *aliénation* mentale et ce qui est *maladie* mentale selon la science psychiatrique a augmenté. A son tour, cela a fait que les profanes ont du mal à comprendre que des criminels qui leur semblent être des gens assez normaux ou des spécimens particulièrement mauvais de l'homo sapiens sont déclarés malades mentaux par les experts médicaux. Cela a provoqué une réaction psychologique assez bruyante, surtout quand le criminel déclaré malade et exempté de punition par le tribunal a appartenu à la catégorie pas très rare ou l'anomalie psychique se manifeste surtout comme un manque plus ou moins complet de sens moral. Ce sont ces gens dont un juriste français dit au milieu du dix-neuvième siècle: »Ce sont des fous, mais des fous qu'il faut guérir en place de Grève».

Pourtant les recherches scientifiques sur les états psychiques

maladifs ou anormaux vont leur train sans s'occuper des vents d'opinions qui naissent et meurent assez vite. D'autre part la juridiction n'est pas une activité ésotérique qui peut être dirigée par l'opinion d'une petite minorité d'hommes de science sur certains faits qui regardent tout le monde. Il est donc nécessaire de faire un compromis pratique entre l'opinion scientifique et les vues des profanes.

Un expédient serait d'abroger du droit pénal toute notion d'exemption de punition. Cela pourrait se faire de deux manières:

1. En regardant l'assistance des aliénés et d'autres mesures protectives contre les criminels comme des mesures remplaçant les punitions.

2. En abrogeant la notion même de punition.

Comme il a été relevé auparavant, les peuples civilisés considèrent depuis une certaine d'années au moins que les états psychiques de »folie», d'aliénation mentale etc. doivent exclure la punition. Il est indifférent que cette attitude soit basée sur des notions métaphysiques ou non. En tout cas, si nous regardions l'assistance des aliénés comme une forme de punition, la plupart des hommes civilisés regarderaient cela comme un retour à la barbarie.

Pour les asiles qui mènent depuis un siècle un combat âpre pour arriver à une situation égale à celle des autres hôpitaux, ce serait une catastrophe d'être de nouveau caractérisés comme des prisons. Le fait qu'ils doivent garder à leur corps défendant certains malades trop dangereux pour pouvoir vivre librement dans la société est une charge psychologique déjà assez lourde.

De plus, si l'assistance médicale donnée aux criminels malades ou anormaux est considérée comme une punition, toutes les autres mesures de protection contre les criminels (traitement des alcooliques dans des établissements spéciaux, des mineurs mal adaptés, des vagabonds etc.) devaient être aussi considérées comme des peines. Or, la clientèle de certains de ces établissements, par exemple des maison de traitement pour alcooliques, consiste pour la plus grande part en personnes dont le traitement

n'a aucun rapport avec des actions criminelles. La transformation des établissements pour alcooliques en des espèces de prisons entraînerait donc des conséquences fâcheuses pour l'assistance aux alcooliques.

Afin de libérer la politique criminelle de la notion d'exemption de peine, il ne reste pas d'autre moyen que d'écarter la notion de peine elle-même. Au fond, il y un élément de métaphysique assez étrange dans l'idée que tout criminel doit être puni, même si cela n'est pas nécessaire pour prévenir des crimes. En réalité, un très grand nombre de criminels et de délinquants, peut-être la plupart d'entre eux, ne sont jamais punis. D'abord quantité de délits (petits larcins dans les maisons, vol d'objets gisant dehors, dégats etc.) ne sont jamais rapportés à la police, le propriétaire sachant bien qu'un rapport n'entraînerait aucune mesure. De plus une fraction seulement des crimes rapportés sont poursuivis et punis. Seul un certain nombre des cas rapportés mènent donc à une condamnation. Pour certaines crimes, par exemple les avortements, la différence entre le nombre réel des crimes et le nombre des cas poursuivis est énorme. Il y a lieu de croire que le nombre réel d'avortements en Suède se situe entre dix et vingt mille par an tandis que le nombre des cas poursuivis se limite à une centaine.

En outre, la loi pénale elle-même ne suit pas la règle que chaque délit doit amener une punition. Quoiqu'elle stipule des peines de degrés variables pour nombre d'actions elle admet bien des exceptions de cette règle (condamnation avec sursis, abstension de poursuite, exemption de peine en cas de démence etc.).

Le principe selon lequel celui qui commet un délit sera puni ne doit donc pas être pris à la lettre. Au contraire, malgrés tous les efforts pour faire revivre la loi pénale par des révisions fréquentes, son principe vital: le crime sera puni, périclite de plus en plus.

A mesure que l'application des peines s'humanise continuellement, ces peines perdent leur caractéristique fondamental: être une souffrance qui est son propre but. La nouvelle loi suédoise

sur l'application des peines vise avant tout à les priver de ce caractéristique en donnant plus de poids à la tendance éducative. La psychologie actuelle n'accorde aucune valeur éducatrice à une souffrance provoquant des sentiments de défi et de vengeance chez ceux qui doivent être éduqués. Les idées modernes sur les moyens et les buts de l'éducation tendent donc à saper le principe de la peine dans le traitement des criminels.

Les gens éclairés de notre temps commencent à considérer la croyance qu'on pourrait changer les criminels en bon citoyens par des punitions rétributives, c'est à dire par des souffrances qui sont leur propre but, de la même manière qu'ils regardent l'idée qu'on pourrait rendre bons des hommes méchants en les menaçant de l'enfer. C'est pourquoi le temps semble mûr pour abolir l'idée primitive, médiévale et barbare de la punition comme un *remède spécifique* contre le crime. Il est temps aussi de supprimer dans la juridiction pénale la méthode puérile de restreindre la tâche social du juge à l'action de consulter le Code pénal pour voir combien de mois ou d'années de travaux forcés sont le traitement approprié au crime de l'accusé.

Au lieu de cela le tribunal comme organe de politique criminelle devrait se poser les questions suivantes:

Quelle espèce d'homme est l'accusé?

Quelles sont les causes individuelles et mésologiques qui l'ont amené à commettre à un moment donné le crime pour lequel il est poursuivi?

»*Est-il nécessaire pour le bien publique ou celui de l'accusé de réagir sur son délit par quelque mesure de politique criminelle?*«

Quand le juge aura répondu à ces questions aussi correctement et complètement que possible il se posera la quatrième et dernière question:

»Quelle mesure faut-il prendre pour empêcher le délinquant de commettre de nouveau des crimes de la même ou d'autre espèce?

Au lieu de ce poser la troisième et plus importante de ces questions les magistrats ont jusqu'ici considéré comme chose évidente que le crime doit être suivi de punition ou de quelques mesures équivalentes, excepté dans les cas où l'accusé a été con-

sidéré comme »non-imputable», ce qui n'est d'ailleurs qu'un vocable abstrus de la philosophie du droit.

Résoudre un problème pratique aussi compliqué que la lutte contre la criminalité en stipulant dans un paragraphe du Code que le délinquent doit subir tant ou tant de mois ou d'années de souffrance par une peine privative de liberté est vraiment user une méthode trop superficielle et trop peu réaliste. Si l'on se décidait à jeter par-dessus bord cette vieille superstition, la procédure d'instruction dans les cas où une telle procédure semble nécessaire devrait se terminer par deux mesures:

1. Une déclaration que l'accusé a ou n'a pas perpétré le crime dont il a été suspecté.

2. Une décision de le confier aux autorités médicales dans les cas où il a besoin d'un traitement médical, aux autorités surveillant le traitement des alcooliques s'il a besoin d'un traitement pour son alcoolisme, aux organisations éducatives si sa maladaptation sociale demande une telle mesure, aux organisation de surveillance et autres institutions sociales s'occupant des personnes pour lesquelles une condamnation à sursis se trouve applicable. Pour le reste des délinquants, probablement un groupe assez petit, il serait décidé par la sentence que l'accusé serait placé, pendant une période fixée, dans un des établissements correspondant aux prisons d'aujourd'hui, mais organisé de manière à éviter non seulement toute souffrance inutile, mais aussi toute mesure produisante des sentiments d'humiliation et d'abaissement de la valeur morale des internes.

Si l'on usait de cette méthode thérapeutique, on pourrait mettre fin au bavardage sur »l'exemption de peine», qui fait penser que le crime est laissé sans aucune réaction sociale. En même temps on écarterait la distinction vague entre punition et mesure de protection, non en changeant celles-ci en des peines mais en abolissant le concept même de punition et en mettant par cela fin à une erreur psychologique millénaire.

Evidemment l'abolition du concept de punition avec toutes ses implications ne signifierait pas que la société renoncerait à se protéger contre les criminels dangereux. Au contraire, en changeant

la base théoretique de ces mesures sociales contre les délinquants elle augmenterait ses possibilités de s'en protéger. Par l'elimination du concept irrationnel de punition les mesures de la société contre les délinquants deviendraient protectrices dans un double sens: *Elles protégeraient les citoyens contre des aggressions dangereuses et les délinquants contre les tendances inhérentes à leur structure psychologique et contre les facteurs du milieu social qui sont des aigillons du crime.* Ainsi l'élimination du concept de punition rendrait la politique criminelle à la fois plus effective et plus humaine.

Certains profanes, surtout des juristes, vont probablement alléguer que l'abolition du concept de punition priverait le code pénal et l'administration de la justice pénale de son effet, selon eux le plus important, de prévention générale.

La question de savoir si c'est la prévention générale ou la prévention individuelle qui a plus d'importance dans la lutte contre le crime, question qui a été discutée à l'excès en Suède, ne sera pas débattue ici. Au lieu de cela je me permets de renvoyer à une étude assez complète dans un ouvrage que j'ai publié il y a quelques années.[1]

La thèse de l'action intimidante ou moralisante du Code Pénal est une assertion qui n'est pas étayée par des preuves. Dans tous les cas où un homme a commis un crime l'effet de la prévention général du Code a été insuffisant. Seulement, ces cas sont les seuls où l'on peut savoir quelque chose de l'action préventive du Code. Nous savons rien des cas où le Code peut avoir abstenu des gens de commettre des crimes. Quand des particuliers allèguent leur expérience personelle à l'appui de la thèse d'une action moralisante ou intimidante du Code Pénal, on peut objecter que le vrai caractère humain, vu sa nature empirique, ne se révèle que par l'action ou l'abstension d'action, toutes circonstances individuelles et mésologiques mises en évidence, et que des croyances subjectives sur des possibilités différentes de ce genre ne sont pas des preuves. L'assertion que la prévention

[1] *O. Kinberg*: Basic Problems of Criminology. 1935.

générale est la tâche la plus importante du Code pénal et de l'administration de la justice ne peut donc pas être prouvée avec certitude. Au contraire, de la connaissance générale des causes du crime et des réactions envers les stipulations du Code que montrent certains délinquants, on peut conclure que le Code exerce une action de prévention générale contre le crime beaucoup moindre qu'on ne le croit de certains côtés.

Plusieurs sociologues américains nous disent que leur compatriotes manquent souvent de respect pour leur Code Pénal ainsi que pour d'autres lois et qu'ils sont disposés à les regarder avec méfiance. On a rapproché cette attitude du fait historique que l'Amérique pendant qu'elle était encore une colonie anglaise recevait ses lois par des décisions du parlement et du roi d'Angleterre sans qu'elle pût elle-même exercer aucune influence sur ces décisions. Plusieurs lois leur semblaient injustes et nuisibles à leurs intérêts, ce qui contribuait à les rendre impopulaires et à provoquer des réactions de méfiance et de défi envers toute cette législation. Quoique les Etats-Unis aient été libres de choisir leur propre législation depuis environ deux diècles cette attitude un peu négative persiste encore parmi leur population.[1]

En Suède, pendant les dernières années, l'exemption de peine suivie d'un traitement dans les asiles ou d'autres mesures protectrices a été une réaction de plus en plus fréquente devant le crime. Un des résultats un peu inattendus de cette politique sociale est que des personnes accusées de crime cherchent souvent à être condamnées à des peines fixées plus ou moins longues plutôt que d'être soumises à des mesures protectrices, bien que toutes ces formes de traitement n'aient pas de caractère répressif. Le fait qu'une réaction judiciaire n'est pas formellement qualifiée de peine ne paraît donc pas dans la plupart des cas enlever le respect que le délinquant garde pour ces mesures.

Cependant, il y a une forme de prévention générale qui n'a rien à voir avec le Code pénal, ni avec l'administration de la justice: ce sont les mesures de protection sociale et les institutions

[1] *Truslow Adams*: An American Epos.

auxquelles incombe la tâche de prendre de telles mesures. A présent il est bien connu que les personnes menacées d'un développement criminel se trouvent avant tout parmi les individus qui souffrent de lésions biologiques, surtout de lésions cérébrales, et parmi ceux dont le développement mental a été enrayé ou dévié par des dispositions pathologiques héréditaires ou par des maladies encourues en bas âge. Nous savons aussi que la »pauvreté culturelle» est une cause importante de maladaptation sociale et d'activité criminelle.[1] Au fur et à mesure que nous deviendrons capables de dépister des déficiences mentales à l'âge scolaire ou avant cet âge et de les traiter d'une manière idoine, à mesure que nous pourrons donner un traitement clinique ou policlinique aux malades mentaux, à mesure que nous disposerons de moyens appropriés pour aider les personnes menacées d'un développement criminel et pour empêcher les jeunes gens de grandir dans un milieu qui empêchent l'évolution de sentiments sociaux, nous pourrons prévenir un développement criminel chez les êtres humains beaucoup mieux qu'en agitant la menace des peines prescrites au Code, peines, dont la plupart des gens sont d'ailleurs mal informés. C'est à ce genre de prévention générale ou sociale que la société doit porter attention au lieu de se contenter de spéculations périmées de philosophie du droit, spéculations manquantes de base empirique et négligeantes les vraies causes de la criminalité.

Le travail législatif préparatoire en Suède visant à une réforme foncière du Code Pénal vient de s'approcher de cette solution du problème: punition ou exemption de punition, en tâchant d'esquisser un »Code protecteur» au double sens de garantir à la fois un maximum de sécurité à la société contre les attaques des délinquants et un maximum d'aide et de protection aux citoyens menacés d'un développement criminel par des déficiences biologiques ou des influences défavorables du milieu.

Avant que cet aspect nouveau du problème ait commencé à

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[1] Cf. *O. Kinberg, G. Inghe, S. Riemer*: Incestproblemet i Sverige (Le Problème de l'inceste en Suède), 1943.

se cristalliser, les méthodes employées pour délimiter les notions de punition et de mesures protectrices ont été en Suède soumises à une discussion approfondie pendant les dernières décades. Au cours de cette discussion, deux tendances assez distinctes se sont manifestées. Dans son rapport sur la rédaction des paragraphes du Code Pénal suédois traitant de l'exemption ou de la diminution de peines à cause de maladie ou d'anomalie mentales (Chap. 5 paragraphe 5 et 6 du Code Pénal) le Comité pour réforme pénale a proposé que l'exemption de punition ne serait décidée par les tribunaux que dans les cas d'aliénation mentale et d'oligophrénies graves, tandis que, contrairement à l'usage actuel, la plupart des »psychopathes» seraient condamnés à des peines ordinaires avec la perspective incertaine de recevoir un traitement médical dans les prisons.[1]

Conformément à ce qui se fait à présent, un certain nombre de »psychopathes» seraient condamnés à être internés dans des établissements de sûreté ou dans prison pour mineurs (»ungdomsfängelse»). Seulement l'établissement de sûreté jusqu'ici considéré comme une mesure de protection quoique en réalité une prison serait rebaptisé »prison de sécurité» ce qui donnerait un caractère plus clairement rétributif à ce genre de traitement. Ainsi ce rapport du Comité pour la réforme pénale révèle une tendance non méconnaissable à résoudre le problème: punition — mesure protectrice en englobant les mesures protectrices dans la punition. Cette tendance, si elle aboutissait, ramenerait aux anciennes méthodes qui consistaient à remplir les prisons de malades et d'anormaux mentaux au lieu de chercher à délivrer de tels gens d'une vie en prison qu'ils supportent souvent assez mal. Il va sans dire que cette tendance est clairement réactionnaire et en contradiction à l'esprit humanitaire qui exige que les malades mentaux soient soumis au traitement médical dont ils ont besoin.

Le projet de loi préparé par le Ministre de la Justice en 1945

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[1] Strafflagberedningens betänkande om strafflagens tillräknelighetsbestämmelser, sinnesundersökning m. m. (SOU: 1942/59).

révèle une tendance diamétralement opposée. Dans ce projet, le paragraphe 5 du Chap. 5 du Code Pénal était conçu en ces termes:

»Un crime commis par une personne mentalement malade, déficiente ou dont l'état mental diffère de la normale à un degré tel qu'il doit être soumis à un traitement spécial n'entraînera pas de punition. Si une personne commet un crime dans un état de confusion mental temporaire, il ne lui sera pas infligé de peine.»

C'est la première fois que le problème du traitement des délinquants mentalement malades ou anormaux a été approché d'un point de vue thérapeutique concret et pratique dans un projet de loi suédois, en proposant que la propriété des mesures à prendre envers l'individu délinquant dirigerait le choix entre les différentes réactions juridiques et sociales possible. Certes, le paragraphe dit que le délinquant sera déclaré exempt de punition. Seulement, cette réminiscence de la mythologie pénale pourrait sans doute être évitée si le Code prescrivait que dans les cas prévus par le paragraphe en question le tribunal doit déclarer que le prévenu devra être soumis à un traitement spécial au lieu d'être puni. En tout cas, le paragraphe en question aurait ouvert un chemin à un traitement rationnel jusqu'ici inexistant des délinquants malades et anormaux et à une individualisation plus parfaite du traitement des délinquants en général.

Malheureusement ce projet de loi, si épuré d'éléments métaphysiques, fut soumis à une critique plus conforme aux idées régnantes parmi les protagonistes des opinions de l'ancienne philosophie du droit, de sorte qu'il ne fut pas adopté par le Riksdag qui lui donna la rédaction suivante.

»Une action commise par quelqu'un sous l'influence d'une aliénation, d'une déficience ou d'une autre anomalie mentale dont la gravité la fait équivaloir à une aliénation mentale ne sera pas punie.

Si quelqu'un est tombé accidentellement dans un état où il a perdu l'usage de sa raison, il ne doit pas être condammé à une peine à cause d'une action commise dans cet état.»

Chap. 5 du Code pénal qui ont été présentés en Suède pendant les dernières vingt années se sont abstenus d'indiquer aucuns prétendus »critères psychologiques d'imputabilité». Dans le paragraphe tel qu'il fut présenté au Riksdag un tel critère réapparaît (»perte de l'usage de la raison»).

Pour la commission consultative à laquelle avait été renvoyé le projet de loi du Ministre de la Justice, »l'imputabilité» paraît toujours être une réalité empirique. Dans son rapport, elle a maintenu qu'il est impropre de »conclure à l'irresponsabilité de l'accusé de son besoin de traitement», et qu'en de tels cas la décision à prendre sur la question de l'imputabilité dépend de circonstances qui devaient être la conséquence d'une décision antérieure à l'égard de »l'imputabilité». Pour la Commission, le besoin de traitement semble donc être dérivé de »l'imputabilité», mais non de l'état mental de l'accusé. Pour une pensée empirique et pratique, une telle opinion semble être vide de sens.

De plus, la Commission est d'avis que l'exemption de punition à cause d'une confusion mentale passagère ne doit suivre que dans les cas où l'accusé a été »totalement incapable de dominer sa volonté». Devant une telle rédaction, il y a lieu de se demander comment des juristes distingués peuvent être si peu au courant de la psychologie moderne qu'ils peuvent parler de »domination de la volonté». Une telle idée n'implique pas moins de trois choses différentes: le corps actuellement existant qui exécute un mouvement; la »volonté» qui sera sans doute une espèce de »force psychique»; et enfin le »moi», imaginé sans doute lui aussi comme une »force psychique» et qui décide si la» volonté», oui ou non, mettra le corps en mouvement. Pour cette manière de voir il ne faut donc pas moins de deux esprits pour mobiliser le corps. Si cela n'est pas de la magie ou de la sorcellerie, il est difficile de savoir ce que l'on doit appeler de ces noms.

Ce raisonnement remonte à l'ancienne psychologie des »facultés de l'âme», dont le fondateur dans les temps modernes est le philosophe allemand Chr. Wolf (1679—1754). Mais quoique la psychologie du droit suive toujours les chemins de cette psychologie fossile, il est étonnant de voir des membres des cours

supérieures tellement peu influencés pas l'évolution scientifique qu'ils sont capables de se servir d'arguments si moyennageux à l'égard d'un projet de loi qui vise à établir une correspondance plus adéquate entre l'administration de la justice et le niveau culturel général du pays.

Les orthodoxies juridiques et théologiques ont bien des points de contact évidents. Leurs croyances sont exposées dans des Codes plus ou moins sacrés et possédants une grande autorité: les Codes juridiques et la Bible. Et pourtant il y a une grande différence entre elles. Malgré l'autorité de la Bible qui dépasse beaucoup celle des lois, l'orthodoxie théologique paraît être plus influencée par le développement culturel que la juridique. La critique de la Bible et la confrontation de l'orthodoxie théologique avec les sciences, la psychologie et la psycho-pathologie, l'histoire, l'éthnologie etc. ont entraîné un écroulement successif de la structure dogmatique orthodoxe. Le diable et son enfer sont pratiquement abolis. On parle de la divinité de Jésus d'une voix moins résonnante qu'auparavant et le Saint-Esprit mène une vie retirée. De plus, l'orthodoxie théologique a perdu beaucoup de ses traits les plus caractéristiques il n'y a pas encore bien longtemps. Il y a à peine une trentaine d'années qu'un professeur d'université suédois fut condamné à plusieurs mois de prison pour »blasphème» parce qu'il avait mis en question la conception immaculée. Aujourd'hui une telle sentence paraît pratiquement impossible.

Il se peut que l'évolution qu'a subi l'orthodoxie théologique dépende du fait que cette orthodoxie a été exposée à tant de monde et qu'elle a l'intérêt que l'on sait pour un très grand nombre de personnes, ce qui lui donne un caractère plus ésotérique que l'orthodoxie juridique. Elle a occupé les pensées de milliers d'hommes et de femmes, puisque la »foi orthodoxe» a été considérée comme une condition de »salut», d'où les comparaisons continuelles entre les thèses de l'orthodoxie et d'autres champs de croyances et de connaissance, d'où aussi les doutes et les objections qui ont engendré une floraison de sectes.

Au contraire, l'orthodoxie juridique est ésotérique et n'existe

que pour un nombre assez restreint de personnes, tandis que la masse du peuple mène sa vie sans s'inquiéter de la structure des dogmes juridiques. C'est pourquoi l'orthodoxie juridique avec sa trinité de »libre arbitre», d'»imputabilité» et de »dette morale» comme base de la culpabilité et ses dogmes accessoires du pouvoir dominant de la prévention générale sur le champ de la politique criminelle etc. a pu mener une vie à l'ombre, sans s'inquiéter de l'évolution scientifique dans d'autres domaines et sans en être beaucoup influencée. C'est à cause de cela que dans certains cas elle est capable de présenter des arguments tirés de ces doctrines surannées afin d'empêcher des réformes rationnelles de politique criminelle.

La discussion qui a eu lieu en Suède pendant les dernières décades sur les problèmes théoretiques de la criminalité et sur son traitement est caractérisée surtout par des efforts pour en éliminer tout élément métaphysique et toutes les idées reçues qui n'ont pas de base empirique. Au cours de cette évolution de la pensée criminologique, il s'est révélé que l'ancien problème du »droit de punir» n'est qu'un problème spécieux. Il a été remplacé par le problème pratique de protection, au double sens de protection des honnêtes gens contre les malfaiteurs et de protection des personnes biologiquement tarés ou déformés par des influences mésologiques malheureuses et qui, par suite de ces circonstances, sont exposées à un développement criminel. Entre ces deux formes de protection il n'y a pas d'opposition, mais seulement une relation de cause à effet, de sorte que la protection des honnêtes gens s'améliore à mesure que se perfectionne la protection préventive ou thérapeutique des personnes biologiquement tarées ou mésologiquement déformées. La question pratique essentielle est le dépistage des tarés ou déformés et la recherche des moyens thérapeutiques d'ordre psycho-social et médical qui nous aideront à atteindre le but: protection individuelle et sociale effectives. Une deuxième question pratique et de grand importance est de garder l'équilibre entre le droit de l'individu à témibilité démontré ou potentielle d'être protégé contre les empiètements inutiles sur sa liberté d'action et celui

des honnêtes gens de vivre à l'abri d'aggressions criminelles. Avec cette évolution de la pensée criminologique et sociologique le problème spécieux »du droit de punir» a été remplacé par le problème réel du devoir de la société de protéger à la fois les honnêtes gens et les individus tarés ou déformés.

Problems of Collective Responsibility.

By

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(London)

I. *The Scope of the Problem.*

Collective responsibility means responsibility of a group of individuals for a crime or crimes committed by some, or perhaps even only one, of its members. It is an extension of individual responsibility to cover acts for which, without the conception of collective responsibility, the individual would not be held responsible at all. In a way, one might say, the problem arises wherever the attempt is made to establish a link of this kind between a crime and a group of individuals of whom some seem to be less directly and less strongly implicated than others. If the instigator or the aider and abetter are punished alongside and even with equal severity as the actual perpetrator, this may well be regarded as an application of the idea of collective responsibility. However, the principles, at least the legal ones, which govern cases of the last mentioned type have become firmly established in most legal systems for many centuries, and it is therefore a somewhat different and less clearly defined aspect of the matter that shall form the main topic of the present paper.

The problem of collective responsibility arises in its purest form where an individual member of a group is held responsible for crimes committed by other members *for the only reason that he is a member.* In other, less extreme cases additional factors

are present which strengthen the link between the actual culprit and his fellow-members; for example:

(a) the group as a whole, without acting as instigator in the strictly legal sense, has expressed its sympathy and solidarity with the perpetrator before or during the commission of the crime. This may not necessarily amount to instigating or aiding and abetting in the strictly legal sense, for instance, where the crimes to be committed are defined only in the vaguest terms, or where the person of the actual perpetrator of the crime remains entirely unknown to the group, or where the act of »instigating» remains unknown to the perpetrator; or

(b) the group has done so after the commission of the crime; or

(c) it refuses to denounce the culprit and to hand him over for punishment, which may happen regardless of whether or not the group approves of the crime; or

(d) the group may in other ways, not definable in general terms, have created the right atmosphere for the crime.

Finally, a factor of a more technical, procedural character may arise and create a desire for collective responsibility: there may be a suspicion that every member of the group has been guilty of crime but actual evidence is available against none or only a few of them.

Needless to say, this list is by no means exhaustive.

The problem of collective responsibility, though closely related to, is not identical with that of the criminal responsibility of Corporations; it is wider since the unit whose responsibility is involved may be an unorganized group, such as a crowd, or a group such as a family, lacking many of the characteristics of the Corporation. On the other hand, many arguments pro and contra adduced in the case of Corporations apply equally to the problem in general.

Let us for a moment consider the possible alternatives according to which the problem could be dealt with: they are

(a) individual responsibility for individual crime, which is

the type we have become used to regard as the normal one: every individual is held responsible exclusively for his actual share, enlarged only by the legal conceptions of instigating, aiding and abetting, and similar ones;

(b) individual responsibility for mass crime, for instance in the case of the leader who is punished not only for his own share but also for criminal acts of his group;

(c) collective responsibility for individual crime: the group is held responsible for crime committed by one, or a few, of its members;

(d) collective responsibility for mass crime, which means that the larger group is held responsible for crime committed by some considerable section of its members.

The reasons why collective responsibility is such a burning issue to-day are to be found partly in the practical field, i. e. in real life, and partly in the theoretical sphere, i. e. in the way in which our thinking tries to master reality. It is a commonplace that our age has become a mass age in which the sentiments, thoughts and actions of the individual are dominated, much more profoundly than in other periods of modern history, by those of the larger groups to which he belongs. The driving forces of our behaviour, social or anti-social, have often to be sought, therefore, in the influence exercised by these large groups, such as the party, the club, the Trade Union, rather than in the individual himself or in small primary groups such as a family. The outrages committed by Nazi Germany on a scale unheard of in previous generations have brought the matter to a head, and the question whether the German people as a whole are collectively responsible for the crimes committed by Germans since the rise of the Nazi party has become one of the burning issues of our age. At the same time, the recent development of such comparatively new branches of scientific knowledge as Sociology and Social Psychology has greatly contributed towards a better understanding of the processes and mechanisms involved.

II. *Historical Developments.*

It is a matter of great interest to reflect on the use which has been made of the idea of collective responsibility at various stages of history. The principle is rightly regarded as one of the basic characteristics of primitive society and, indeed, as one of the main points of contrast between primitive and modern thought. It would serve little purpose to give a selected list of references to illustrate this point. The whole anthropological literature abounds of examples taken from a great variety of primitive cultures.[1] The conception of blood vengeance, of vendetta, rests on the collective responsibility of the family; but, as Fauconnet has stressed,[2] even after the disappearance of blood vengeance the collective element sometimes survived at least in the field of pecuniary co-responsibility of the group. The same writer draws attention to the fact that, although collective responsibility has now become an exception in criminal law, wherever it has remained it shows the same common features, such as being confined to the most serious crimes against the State.

In a recent study, an expert on the law of the Old Testament, Dr. David Daube,[3] has made an interesting attempt to clarify the conception of collective or, as he calls it, communal responsibility by distinguishing it from what he terms »ruler punishment«, and to show how these two conceptions are treated in the Bible: »Briefly, he writes, in the case of communal respons-

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[1] »Given the conception that the individual is merged in his group, it follows logically that his fellow-members are collectively responsible for his misdeeds. Though this is an archaic notion, it persists to the present day in the warfare of civilized nations.» Robert H. Lowie, Primitive Society, 2nd ed. (1929, p. 385). In »The Material Culture and Social Institutions of the Simple Peoples» by L. T. Hobhouse, G. C. Wheeler and M. Ginsberg (1930), pp. 54 and 79, it is stressed that collective responsibility is by no means universal and that it tends to become more widespread with the growing use of a composition system.

[2] Paul Fauconnet, La Responsabilité (Paris, deuxième edition 1928), p. 69.

[3] Studies in Biblical Law (Cambridge 1947), Chapter IV: Communal Responsibility.

ibility proper, the community as a whole is deemed to be tainted by and answerable for the crime of any member (for example, a city may be answerable for a murder committed in its midst); while in the case of ruler punishment, the community suffers, not as answerable for the crime of a member, but as the property of a guilty ruler (for example, a sinful king may be punished by the plague decimating his people).» In his view, these two notions »belong to very different religious and political settings (and) their history is not the same». The first great example of the working of communal responsibility which he uses for his discussion is, of course, Abraham's intercession for Sodom and Gomorrah. Abraham, he argues, though realizing the danger of grave injustice which may arise from the punishment of the whole group for the misdeeds of a majority, did not see that justice ought to move in the direction towards purely individual responsibility. Instead, Abraham asks God to apply, in the place of the traditional principle, the idea of »communal merit», i. e. the towns should be spared altogether if only a small minority of ten righteous citizens could be found. The collective element in dealing with groups of human beings, the idea that a group must be treated as a unit without any individual discrimination is to be retained, but only in favour, not to the disadvantage, of the group. »Probably, communal thinking was so deep-rooted that Abraham could think in no other way ... So he criticized the results while, essentially, approving of the system.»[4] However, as Daube shows, there are also very distinct traces of the idea of individual, superseding collective, responsibility in the Old Testament, as, for example in the story of Korah's revolt when Moses and Aaron pleaded with God to punish only the guilty, instead of the whole people; or in the commandment Deuteronomy XXIV.16: »The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin»; or in the law Deuteronomy XXI.1 that, if a murdered man is

[4] Daube, p. 157.

found near a town and the murderer cannot be discovered the elders of the town have at least to bring a sacrifice.»[5]

Roman law, though on the whole accepting the principle of individual guilt, nevertheless knows collective responsibility with regard to the confiscation of the family fortune, and the *lex quisquis* of Arcadius (397 A. C.) is called by Fauconnet »*la plus célèbre de toutes les règles de responsabilité collective*».[6] In the Germanic laws , it is mainly the penalty of outlawry that bears a collective character.[7]

In the treatment of the subject in Mediaeval law, attention has mainly been focussed on the criminal responsibility of Corporations.[8] The glossators »were bold enough to proclaim the corporate criminal liability, without however attempting to justify it on the strength of the sources available», with the only proviso that they required »some vaguely conceived corporate will to commit a crime».[9] Bassanius asks, for instance, in the case of some forest depredations jointly committed by the inhabitants of a village whether the village authorities had been with the crowd, whether there had been any ringing of bells, beating of drums or other external means of calling them together for corporate action. On the other hand, Pope Innocent IV is opposed to corporate punishment, but mainly, it seems, because the penalty he had in mind was excommunication.[10] Bartolus, again, approves of it, even of such acts as the punitive destruction of entire communities for rebellion committed by their leaders. It is interesting to note, however, that he distinguishes according to the size of the guilty community: if it is small, the fine should be imposed only on those members who had given their explicit consent to the crime, whereas in the case of large groups, such

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[5] Daube, p. 160.

[6] Fauconnet, p. 78—79.

[7] Fauconnet, p. 80.

[8] See now the recent study by Dr. Walter Ullmann, The delictal Responsibility of Mediaeval Corporations, The Law Quarterly Review, Vol. 64, January 1948.

[9] Ullmann, pp. 78—80, 84.

[10] Ullmann, p. 82.

as municipalities or nations, distinctions according to guilt would be too difficult — a consideration which, in a modified sense, we shall later find again in the Nuremberg Judgment. Moreover, collective punishment is accepted by Bartolus only where the crime was committed in accordance with a communal resolution preceded by adequate deliberations.[11]

In England, William the Conqueror established the institution of »murder-fine» which placed collective responsibility for the death of a Norman on the hundred, a small unit of local government: »If a person were found dead, and there were no 'presentment of Englishry', that is to say, if the body could not be proved to be that of an Englishman, it was presumed to be that of a Norman, and the hundred was rendered liable to pay a murder-fine.»[12] There was also the institution of Frank-pledge in early English law, which meant a group of adult men, sometimes all men living in a certain township, who were liable to a fine if they did not surrender those members of their group who had committed a crime. After the decay of this institution in the fourteenth century, England, it has been said, »possessed no effective machinery for arresting criminals or for preventing the commission of crime, until the creation, by Sir Robert Peel's energy, of the modern police force».[13]

With regard to more recent periods of history, Fauconnet refers to certain provisions in the former Chinese law which, needless to say, have not been taken over by the present Penal Code, according to which in cases of high treason and aggravated murder certain members of the culprit's family were liable to capital punishment or banishment for life.[14]

In some of the British Colonies, the Government has accepted the principle of collective responsibility as a living force and incorporated it in its own Ordinances. In Nigeria, for example,

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[11] Ullmann, p. 89—90.

[12] Dr. H. G. Hanbury, English Courts of Law (1944), p. 28.

[13] C. S. Kenny, Outlines of Criminal Law, 14th ed., 1933, p. 458.

[14] Fauconnet, p. 71 et seq.

a Capital Punishment Ordinance provides that in certain cases punishment may be imposed on an entire group for an offence committed by one or more of its members. This Ordinance is, however, stated to have become a dead letter in actual practice.[15] In Transjordan under the British Mandate, a »Board of Control» had power to arrest the relatives up to the fifth degree of the aggressors in tribal raids and to detain them until the aggressor had been handed over and the booty restored — a system which is said to have greatly increased the respect for law and order in that country.[16] Such examples could be easily multiplied.

Under Nazi rule, collective responsibility, as generally known, reached its hey-day, not only as a result of the system of hostages but also because of its universal application in Concentration Camps. In all those numerous descriptions of life in such Camps which we owe to former inmates, particular stress is laid on the fact that every inmate had to be a member of at least one collective unit within the Camp; that nearly every detail of Camp life was subject to collective regulation; and that collective responsibility and punishment was not the exception but the rule.[17]

It is this aspect of Nazi penal technique — the infliction of suffering on whole groups of people regardless of individual guilt — perhaps more than any other of their outrages, that has eventually produced the widespread sentiment in favour of collective punishment of the German people as such. To such tendencies the Allied Powers have not yielded. It is not intended in this paper to give any detailed account of the treatment of war criminals or to deal with the many controversial problems arising from it. At present, our only concern is the question of how far collective ideas have been applied in the matter. In one of

[15] C. K. Meek, Law and Authority in a Nigerian Tribe (1937), pp. 338—339.

[16] Meek, loco cit.

[17] See, for example, Benedikt Kautsky, *Teufel und Verdammte* (1946), p. 176; Bruno Bettelheim, Individual and Mass Behaviour in Extreme Situations (Journal of Abnormal and Social Psychology, Vol. 38, October 1943, pp. 417 et seq.).

the best-informed books on the subject [18] it is stated: »Foremost in the public eye is the continued detention without trial of ten thousend persons originally arrested *en block* because of their positions under the Nazi régime. It is the affinity of such procedure with Gestapo methods and the replacement of individual by collective accusation which constitutes a grave detraction from Western ideals of justice. This has been increased by the collective sentence of certain Nazi organizations such as the S. S. and the S. A. by the Nuremberg Tribunal.» Quite apart from the obvious mistake concerning the S. A. which the Nuremberg Tribunal did *not* declare to be a criminal organisation,[19] and in spite of the same author's admission that the effects of the Nuremberg Judgment have been mitigated by executive Ordinances, the sentences quoted above would seem to give a misleading impression of the real meaning of the Judgment and of the Charter from which the Nuremberg Tribunal derived its competence and functions. How far can they actually be said to apply the principle of collective responsibility? As well known, the Charter, in addition to the punishment of individual persons, provided in art. 9:

»At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.»

The effect of such a declaration was, according to art. 10 of the Charter, that the competent national authority of any Signatory of the Charter had the right to bring individuals to trial for membership of such a criminal organisation, and that »in any such case the criminal nature of the group or organisation is considered proved and shall not be questioned». Moreover, according to an Act passed by the Control Commission for Ger-

[18] Dr. Wolfgang Friedmann, The Allied Military Government of Germany (1947), p. 175.

[19] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, London, H. M. Stationery Office, Cmd. 6964, 1946, p. 80.

many on December 20th, 1945, and quoted in the Judgment, membership of a group or organisation declared criminal by the International Military Tribunal is recognised as a crime for which the usual penalties, including death and imprisonment for life, may be imposed.

The Nuremberg Judgment stresses, however, that all these provisions should be applied

> »in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishment should be avoided. If satisfied of the criminal guilt of any organisation or group this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent Tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished».[20]

In fact, the Tribunal restricted the scope of collective punishment in the case of every group or organisation which it declared to be criminal to those members »who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes». Accordingly, the charge in the subsequent trials before Allied or German Tribunals has been one of membership with knowledge that the organisation was being used for the commission of crimes.[21] However, the Judgment contains also the further remark that persons »who were drafted by the State for membership» should also be excluded from responsibility unless personally implicated in crimes.[22]

From this, it appears that the practical consequences of the

[20] Nuremberg Judgment, pp. 66—67.

[21] Friedmann, p. 175.

[22] Judgment, pp. 67, 79.

special treatment meted out to criminal organisations by the Charter and the Nuremberg Judgment are twofold:

First the question whether a certain organisation was a criminal one was finally decided at Nuremberg for all subsequent trials, and it was not open to individuals charged because of their membership to question this decision. This is a procedural device of a technical character, indispensable in a situation where the same point is of legal significance for an extremely large number of subsequent individual trials. To alleviate any undue hardship which might possibly have been caused to individual members if their organisation was condemned, art. 9 of the Charter provided that they should be entitled to apply to the Tribunal for leave to be heard upon the question of the criminal character of the organisation. In fact, such applications were received and dealt with in very large numbers.

It should be noted in this connection that the Tribunal refused to declare the Reich Cabinet to be a criminal organisation because, among other reasons, it was only a small group and there would therefore be no technical advantage in dealing with it in a wholesale manner.[23]

The second consequence of the provisions of articles 9 and 10 of the Charter as interpreted by the Nuremberg Tribunal was that a member of a criminal organisation could be punished only if it could be proved against him that he had become or remained a member with knowledge that the organisation was being used for the commission of crimes. Although opinion in various countries may differ, it seems at least doubtful whether this has to be regarded as a deviation from the general principles of criminal law regarding complicity, in other words, whether complicity requires more than becoming or remaining a member of an organisation knowing that it was engaged in crime. If, as appears likely, this would have to be answered in the negative for most legal systems, one would have to come to the conclusion that the principle of collective responsibility

[23] Judgment, p. 81.

has not been accepted in the War Crimes trials. It needs hardly to be stressed that all the individual defences such as insanity, mental deficiency, youth, and so on, could be argued freely in subsequent trials of each member.

III. *Socio-psychological and penological Considerations.*

This brief historical sketch of the development of collective responsibility »from Sodom to Nuremberg» seems to indicate that we are here faced with one of those ideas which correspond to certain deep-rooted emotional tendencies and can therefore, in spite of the strongest repression on the part of our conscious and rational thought, never be wholly destroyed. In this respect the problem may bear some resemblance to that of Retribution which, much as we may dislike it, we shall probably have to accept as one of predominant features of our penal system for many years to come. All the more is it the duty of the penal philosopher and social psychologist to examine the various factors which may help to explain those tendencies.

Is there, to begin with, anything like an inborn instinctive feeling in the constitutional make-up of the human personality that would require collective rather than individual punishment for wrongdoing? If this were so, it would explain, in particular, the prevalence of this institution in primitive communities.

Could one assume, for instance, the existence of an innate tendency in the human mind towards generalization and simplification rather than individualization and discrimination in our judgments of other persons? No doubt, we are often inclined to use sweeping generalizations even when dealing with one individual, to condemn an entire personality on the basis of one single case of misconduct which, perhaps too hastily, we regard as symptomatic: »He has stolen once — he will steal again — he is a thief by nature.» Naturally, this way of thinking can easily be applied to the collective unit. If the man in the street has been cheated by his greengrocer he will be distrustful of

greengrocers in general. This is one — though by no means the only — explanation of that phenomenon which supplies probably the oldest and most impressive illustrations of collective judgment, responsibility and punishment: Antisemitism, and it also accounts for many exaggerated conceptions of the strength of national character.[24] It is, moreover, closely related to the need for a scapegoat, though there is the obvious difference that the scapegoat is not necessarily a collective unit and that, even where it is one, none of its members may in any way be responsible for the crime. The tendency to pass collective judgments is stronger with regard to minority groups such as the Jews where it is re-enforced by the presence of other psychological, sociological and historical factors; to some extent, however, it does exist everywhere. »If the Tiber overflows into the city, if the Nile does not flow into the countryside, if the havens remain unmoved, if the earth quakes, if there is famine or pestilence, at once the cry goes up: 'To the lions with the Christians'», complained already Tertullian.[25] To give a recent example from the daily life of a modern community: In 1942, a violent fire destroyed the »Cocoanut Grove», a popular nightclub in Boston, Massachusetts, causing the death of nearly 500 people.[26] »Through its news reports and featured articles, the press had directed its wrath against the public officials individually ... Significantly, however, ... the reaction of the public was essentially against the public officials *as a group or class*.» Their collective negligence, laxness and incompetence was blamed in 90 per cent. of the »letters to the Editor» published in one paper. The explan-

[24] From the very comprehensive literature on these two problems only two recent publications may be quoted: Morris Ginsberg, Reason and Unreason in Society (Essays in Sociology and Social Philosophy, 1947), Chapters VII: National Character and X: Anti-Semitism; James Parkes, An Enemy of the People: Anti-Semitism (Penguin Books, 1945).

[25] Parkes, p. 86.

[26] An interesting analysis of this case is given in an article by Helene Rank Veltfort and George E. Lee, The Cocoanut Grove Fire: a Study in Scapegoating (Clinical Supplement to the Journal of Abnormal and Social Psychology, Vol. 38, April 1943, pp. 138 et seq.).

ation for this »Blanket scapegoating» given in the article quoted below is: the desire for a simplification of a legal and moral issue complicated by the complexity of the building laws »with the consequent confusion as to the functions of various city officials made blaming them collectively much simpler than blaming them as individuals».[27] Moreover, these officials were not usually known to the public as individuals; therefore, they were rather treated as a symbol for everything that was regarded as rotten in the local administration. Here again, one might conclude, certain special circumstances seemed to have helped to bring into the open a tendency which might otherwise have remained hidden.

The fundamental problem as to the innate character of the desire for collective punishment has been experimentally examined by Professor Jean Piaget.[28] There is no need here to go into the details of his most interesting analysis. He asked children of various age groups to give their views, for three different situations, as to whether they regarded punishment of a whole group as just: (1) where no attempt is made by the adult to find out the actual culprit, (2) where the adult tries in vain to discover him but he does not own up and the group refuses to denounce him, (3) as under (2) but the group is not aware of his identity. According to Piaget, the answers showed that the idea of collective responsibility evoked no spontaneous response in these children, i. e. collective responsibility in the sense of holding members of the group responsible merely because of their membership (case 1). If, however, the group declares its solidarity with the offender by refusing to denounce him, the children regard this as sufficient to justify collective punishment. The reasons for this attitude differ according to age: whereas the younger children simply think it is wrong not to denounce the culprit and are inclined to take it for granted

[27] Veltfort and Lee, p. 146.

[28] Jean Piaget, The moral Judgment of the Child (English translation 1932), pp. 231 et seq.

that somebody has to be punished for a crime at any cost, the older ones base their judgment on a feeling of solidarity not with the adult but within the group which, by refusing to co-operate with the adult, declares its willingness to bear the consequences for this refusal. There is, however, also a third category among these children: those who insist on treating each individual case according to its merits and, therefore, prefer punishment of no one to that of an innocent.

With regard to primitive communities, too, the evidence seems to indicate that it was by practical and rational considerations rather than by any constitutional factors characteristic of innate qualities of the human race that the prevalence of collective responsibility has to be explained. Collective punishment is useful as a means of preserving order and preventing crime. If the whole group has to expect punishment for misconduct of individual members, it will do everything in its power to uphold order and discipline, and as the community spirit is particularly strong in primitive groups every member will do his utmost to protect his group from being punished for individual crime. The institution of collective responsibility is, therefore, the strongest possible deterrent where the group spirit is still a living force, and it loses its effect where this spirit has disappeared.[29] There is the additional factor that pecuniary penalties have to be imposed upon the group because of the collective nature of the family property, but from the point of view of penal philosophy the principal argument in favour of collective punishment is that of deterrence and discipline, with the more constructive object of training for group life in the second place. In Nazi Concentration Camps its application became an accomplished art, developed to its last refinements. »The idea was that every prisoner ought to feel responsible for any act committed by any other prisoner.«[30] The ultimate effect was, however, not only deterrence and better discipline but also some

[29] See, for instance, Hans Kelsen, Society and Nature (first published in England 1946), p. 361; David Daube, op. cit., pp. 180—181.

[30] Bettelheim, loc. cit., p. 434 fn. 16.

sort of acceptance of Gestapo ideals by the prisoners. Since a poor capacity for work was as much to the detriment of the group as misconduct and as, moreover, weaklings were more likely to become informers, even the prisoners sometimes adopted the Nazi ideology towards the extermination of unfit members. Again, it is reported that many of them did not want their escaped fellow prisoners to »tell the story of the Camps» abroad.[31] In part, such attitudes were of course the almost inevitable result of the system of group punishment and intimidation; in part, they were due to German nationalism which, in some cases, proved to be stronger than hatred of the Nazis. In a way, however, they may, as Bettelheim indicates, also show how collective punishment, by building up a strong feeling of group unity, can easily have the effect, whether intended or not, of forming a link between punisher and punished. Unconsciously, the unity of the group is extended beyond the circle of prisoners so as to include even the Nazi guards.

On the other hand, the Nazi system was careful to prevent the growth of martyrdom, which would have unduly strengthened the feeling of a group unity limited to prisoners, by punishing the group more severely for actions by potential martyrs.[32]

It is largely in view of such penological, socio-psychological and educational mechanisms — the deterrent effect of fear and the disciplining and community-building effect of collective treatment — that even nowadays this form of punishment is so often used in Schools and reformatory Institutions for juvenile offenders, and occasionally also in Prison for adults. Training in group habits and group loyalty frequently means collective privileges, rewards and punishments. To quote a recent exemple from the Press:[33]

> »Five hundred schoolboys at ... County Grammar School sat at their desks to-day when they should have been starting

[31] Bettelheim, loc. cit. pp. 448—449.

[32] Bettelheim, p. 436.

[33] Evening Standard (London), 14th May, 1948.

their Whitsun holiday. The headmaster saw that the Army Cadet Corps notice board had been slashed. Nobody owned up. So the boys were told they would have to go to school to-day.»

Experienced and enlightened educators insist that the instrument of collective penalties is an evil, though perhaps a necessary one, and should be applied only in carefully selected cases where the relationship between staff and pupils is good and the latter can be expected to appreciate the situation and to co-operate. In other words, it is an instrument to be used to strengthen an already existing spirit of loyalty and cooperation, not to create one where it did not exist before.

In the very interesting »Report of the Committee of Enquiry into the conduct of Standon Farm Approved School and the Circumstances connected with the Murder of a Master at the School on 15th Febr. 1947»,[34] the dangers connected with collective punishments and the threats of collective fines are emphasised, and they are even included in the list of the main causes of the murder by some of the boys of a master whom they shot instead of the Headmaster they had actually intended to kill. It is pointed out in the Report that

»The boys were firmly of opinion that collective punishment and collective fines were inflicted. The Headmaster and Staff told us that occasionally the boys were made to stand on the parade ground for periods of 15 to 40 minutes, but only for collective misconduct, disobedience and rowdiness . . . Such forms of collective punishment inevitably caused deep resentment amongst innocent boys who felt they were being unjustly treated. Similarly the boys deeply resented the imposition of collective fines . . .» (which were, in fact, never actually imposed).

This feeling of injustice so often created by an attempt to hold a group collectively responsible can easily become so strong that the deterrent and educative effects may be altogether lost.

[34] London, H. M. Stationery Office, 1947, Cmd. 7150, pp. 22 and 26.

Moreover, although this has been doubted,[35] a group can as a rule better resist the pressure of punishment than an isolated individual. This in particular where the group is so large that the penalties to be inflicted can, for practical reasons, not be very severe. It is interesting to observe the various conflicting arguments concerning the impact of this factor — the size of the group — on the theory and practice of collective punishment: Bartolus and the Nuremberg Tribunal, as we have seen, use the opportunist argument that in the case of small groups there is no need for collective punishment. Social psychologists argue that very large groups are often too successful in building up internal defence mechanisms for collective treatment to have much deterrent or re-educative effect. Criminologists may add that, according to the principles of mass psychology, the larger the group, the slighter the individual guilt of each member is likely to be, especially in view of the strength of mass suggestibility which grows in proportion to the numbers involved.

IV. *Collective Responsibility and the German Question.*

In the discussion of recent years on the »German Question» most of the points so far mentioned have played their part. Although the idea of collective punishment of the German people has been given up, the world at large has expected Germans to show at least some awareness of their collective responsibility for the crimes committed under the Nazi régime. That such a collective responsibility, certainly not for everything but for a great deal of what has happened, does exist and should not be shirked has been admitted in recent years even by German writers whose impartiality can hardly be questioned, such as Wilhelm Röpke,[36] Karl Jaspers,[37] and, though less clearly, Leo-

[35] Bettelheim, loc. cit., p. 452.

[36] The German Question (translated from the second edition of his »*Die Deutsche Frage*», 1946), especially pp. 27, 62—63.

[37] *Die Schuldfrage* (1946).

pold von Wiese.[38] No such awareness seems to exist, however, among the masses of the German people.

> »They neither understood nor accepted the idea of collective responsibility. They were not frightened to talk about the atrocities of the concentration camps, but they talked as if they had not only had no part in these things, but couldn't see how any one could impute blame to them. There is no idea of identifying the people with the government«,

writes an unnamed English student with regard to German students he met in the summer 1947 at summer schools held at various German Universities.[39]

It is of considerable interest to read the psychological explanation for this absence of any guilt feeling given by a writer of an entirely different backgrund, a former inmate of a Concentration Camp, who stresses the failure of the »Shocktactics« of the thesis of collective responsibility.[40] Far from awakening the German conscience, he says, it only served to strengthen the power of resistance to a charge believed to be excessive because of its lack of discrimination according to degree of guilt. Other writers suggest that the failure to convince the German people of their guilt was largely due to the effect of the mass factor: »The impact of cultural differences or of social disapproval is weakened by the presence of others who share it . . . Punishment is less likely to affect the behaviour of a group than of an individual.«[41]

It should have become clear by now that the problem — of German responsibility as well as of collective responsibility in general, — can be brought nearer to a satisfactory solution, if at all, only by carefully distinguishing its various categories

[38] *Ethic* (1947) pp. 419—420, 440.

[39] Approved Schools Gazette, March 1948.

[40] Eugen Kogon, *Der S. S. Staat* (1946), p. 327.

[41] Charles Strother, Methods of modifying Behaviour (in Journal of Social Issues, Vol. I No. 3, August 1945, p. 51). A different view is expressed by Bettelheim, loc. cit., p. 452, who believes that it is easier to resist pressure as an individual than in a group.

and types as they may arise in actual life. The main aspects to be borne in mind in making the necessary distinctions are, it seems, as follows:

(1) the type of crime involved,
(2) the size of the group,
(3) the character and internal cohesion of the group,
(4) the degree of individual participation,
(5) the type of collective responsibility and of sanctions involved.

As most of the other aspects have at least been touched upon in our previous discussion, the remainder of the space at our disposal should be devoted to the final point. In his penetrating study »*Die Schuldfrage*»,[42] Karl Jaspers has made an attempt to clear the air, and in this he has, to some extent, been successful. To reduce his argument to its barest outlines, there are four different types of guilt and, consequently, of responsibility and of sanctions which have to be kept strictly separate: criminal-political-moral-metaphysical. Man is *criminally* responsible for certain clearly defined and proved acts against the criminal law, with consequent punishment inflicted by the Court. As citizen, he is *politically* responsible for actions of his Government; the crucial factor here is success or failure of that Government's policy, and the sanction is imposed by the victor on the vanquished. In the *moral* sphere, only the individual himself and his conscience are competent to judge, and in case of moral guilt repentance and heart-searching are required. *Metaphysical* guilt, finally, arises from the solidarity between human beings as such which makes everyone responsible for every wrong in the world, especially for crime committed with his knowledge, unless he has done everything in his power to prevent it. However, others are entitled to take the individual to task only in the criminal and political, not in the moral and metaphysical spheres. From this, it would follow that collective responsibility

[42] 1946.

has its place in every sphere except that of the criminal law, but in different forms. It is most tangible in the political field where it can be enforced by the victor; it exists in the moral and metaphysical sphere but can be neither proved nor enforced from the outside.

In his most recent work,[43] Jaspers has expressed himself more briefly but perhaps also more clearly on the metaphysical side of the problem: The circle within which man says: »*mea culpa*« is growing wider. Every individual has from the very beginning and before he realizes it, participated in the guilt of his ancestors as he founds his own life on theirs for good or bad. As an individual he becomes responsible for every wrong which is being committed unless he risks his life to prevent it. However, Jaspers stresses again, nobody has the right to blame the other for this because everybody is equally guilty, though there can be a common feeling of guilt and responsibility among free men.

Criticism of Jaspers' line of argument will have to be directed either against his fourfold distinction or against the manner in which he draws some of the boundaries between those four categories. The distinction between legal, moral and political guilt is, of course, one might almost say, one of the fundamental commonplaces of legal and political philosophy, and the additional category of metaphysical guilt, though perhaps not throughout clearly defined, is nevertheless equally indispensable. This metaphysical guilt comes probably nearest to Dostoevsky's idea of universal responsibility: »Every one of us is guilty before all, for all, and for everything ... Even those who know nothing of crime are mysteriously accomplices in it»,[44] although Jaspers' criticism of certain »Eastern exaggerations« is probably directed against Dostoevsky. This criticism is justified since, if

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[43] *Philosophische Logik.* Erster Band: *Von der Wahrheit* (1947), p. 536.

[44] This aspect of Dostoevsky's philosophy is well brought out in Henry Troyat, Firebrand. The Life of Dostoevsky (Engl. translation by Norbert Guterman, 1946), pp. 394, 405.

every one is responsible for everything the practical consequence is that nobody is responsible. There is, however, a certain, no doubt unconscious, tendency in Jaspers' analysis to expand the scope of the moral and metaphysical, if not at the expense of the legal, at least at that of the political sphere. There is more implied in the conception of political responsibility than the responsibility arising from the mere fact of being a citizen of a certain country. This is only the barest minimum, and for the problem of collective responsibility it may in some cases not amount to very much. But if there is, as in the majority of individual citizens, the additional factor of a common cultural and social inheritance, political responsibility for the »manner in which we are governed» can hardly be disposed of so lightly as Jaspers, and still more the majority of the German people, seem to be inclined to do. Jaspers himself is, of course, as his writings show, fully aware of this, but by including this cultural aspect of political responsibility in the moral or metaphysical sphere he has transferred it from the area where our conduct is open to criticism from outside to an area where we are responsible only to ourselves. To block tendencies of this kind which can only have the result described by our unnamed student, one might have to add to the four types of responsibility conceded by Jaspers a fifth category, cultural and social responsibility, standing between the purely political, on the one hand, and the moral and metaphysical, on the other. The more the scope of the criminal law is restricted in the field of collective responsibility, the more strongly should be stressed not only its, in the last resort entirely uncontrollable, moral and metaphysical aspects but also its social and cultural ones which can be at least more clearly defined and judged by an impartial Tribunal. Only if the various elements of collective responsibility are openly and fully discussed can the question of treatment and especially of prevention be tackled. The point recently made by the editor of this journal [45] that many crimes might be prevented

[45] Åke Petzäll, The Social Function of Punishment, Theoria, Vol. XIII, 1947.

if society would supply prophylactic aid is equally valid in the international sphere, and such preventive machinery might in the course of time prove more effective than the threat of collective punishment.

Is a Sociological Explanation of Law possible?

By

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In this paper I propose to examine two modern theories of law, on the one hand the theory of Professors Petrazhitsky and Sorokin, on the other that of Professor Timasheff. Both theories are marked by a realistic, non-metaphysical tendency. There is a certain affinity between them: Timasheff has doubtless been strongly influenced by Petrazhitsky, though he rejects some of Petrazhitsky's fundamental ideas.[1]

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[1] Timasheff's theory is put forward in his »*Introduction to the Sociology of Law*» (1939). Petrazhitsky's works are written in Russian. The account given here of his theory is based on the following sources:

(1) Sorokin, *Contemporary Sociological Theories* (1928) p. 700 ff. (cited *Sorokin*) and *The Organized Group (Institution) and Law-Norms* in the *Interpretations of Modern Legal Philosophies, Essays in Honor of Roscoe Pound*, edited by Paul Sayre (1947). This book is cited *Interpretations*.

(2) Timasheff, *Introduction to the Sociology of Law* (cited *Timasheff*) and the essay *Petrazhitsky's Philosophy of Law* in the *Interpretations*.

(3) G. Gurvitch, *L'idée du droit social* (1932) p. 105 ff. (cited *Gurvitch I*) and *Le temps présent et l'idée du droit social* (1932) p. 279 ff. (cited *Gurvitch II*).

(4) Meyendorff in *Modern Theories of Law* (1933) and the essay *The Tragedy of Modern Jurisprudence* in the *Interpretations*.

(5) Laserson, *Positive and »Natural» Law and their Correlation* in the *Interpretations*.

I have relied very much on the account given by Sorokin; in his essay in the *Interpretations* p. 694[1] he says that »the subsequent analysis of law-norms follows the brilliant analysis of law by Leo Petrazhitsky».

The classical problem of legal philosophy has been how to *justify* coercion in the form of punishment, with reference to ultimate values. This problem is not, however, the subject-matter of the two theories to be treated here; they are only concerned with the actual nature of law. From a thoroughly realistic point of view the problem of justification does not exist as a scientific question: it can only be answered on the bases of feelings, not through investigation of objective facts.

The question to be discussed here is whether the present authors have succeeded in their endeavour to build up realistic theories. My intention is to make use, as far as possible, of their valuable contributions in this respect. At the same time, I shall endeavour to sort out elements that do not fit into a realistic theory, and in this manner to penetrate further into the clarification of the nature of law. The principal question is whether law can be explained as an actuality, as a sociological phenomenon.

A. The Psychological Theory of Petrazhitsky and Sorokin.

The ultimate aim of Petrazhitsky was to lay the foundation of a new science of legal policy inspired by the ideal of »active love» as opposed to Ihering's principle of interest. To this end he wished first of all to state in a wholly realistic way what law *is*. Petrazhitsky's theory might be called »psychological», because he maintained that the phenomenon called law consists of a sum of *subjective conceptions or representations*. »He tried to reduce all legal phenomena to certain basic psychological

An obituary of Petrazhitsky by E. Balogh appeared in *Acta Acad. Univ. Jurisprud. Comparat.* II: 1 (Paris 1934) p. 64 (cited *Balogh*).

Two essays on legal philosophy by Petrazhitsky have been published in German: *Über die Motive des Handelns* ... (Berlin 1907) and *Methodologie der Theorien des Rechts und der Moral, zugleich eine neue allgemeine logische Lehre von der Bildung der allgemeinen Begriffe und Theorien*, in *Opera Acad. Univ. Jurisprud. Comparat.*, Studia, fasc. 2 (Paris 1933). These have not been available to me.

regularities» says Timasheff.[1] This implies, in the first place, that rights and duties (obligations) are not objective realities; they are nothing but »phantasmata». Petrazhitsky's meaning is that they exist only in the mind as subjective representations. Timasheff relates his view in the following way.

> »Within man there exists a closed, psychic world accessible only to its bearer; without is the spatial-temporal world comprising all men and identical for all of them. In this latter world there are no rights, duties, powers, and the like. We are unable to find anything corresponding to property, obligations, rights, or the like, in the externally observable traits of the man to whom we ascribe them, or in his environment, or, in general, in space. Consequently, these phenomena may exist only in the inner or psychic world of the man. But again we are unable to find anything in the mind of those to whom we ascribe rights, duties, power, etc., for we ascribe them even to insane persons or to corporations.[2] There is only one possibility left: to look for legal phenomena in the mind of those who ascribe rights and the like to somebody — to themselves or other persons.»[3]

1. *Criticism of the State Theory.*

From what has now been said it is evident that Petrazhitsky cannot ascribe to law the character of an objective ought.[4] Rights and duties are not real; only ideas about rights and duties are real. This would not, however, exclude the possibility of regarding the rules of law as commands of the state. On the contrary,

[1] Timasheff, p. 53; cf. pp. 3, 213. »The idea that law is only a sum of subjective representations forms the essence of Petrazhitsky's theory» (p. 17). Cf. Balogh p. 74.

[2] Petrazhitsky obviously wants to say that a legal right cannot be a »Willensmacht» in Windscheid's sense.

[3] *Interpretations* p. 742 f.

[4] Cf. Timasheff, *Interpretations* p. 742: »Petrazhitsky formulated the fundamental problem of legal philosophy in this way: 'the aim is to discover the causal properties of law in general and of its individual elements and types'.» From this and other utterances it is evident that Petrazhitsky intended his theory to be quite naturalistic.

the reduction of rights and duties to mere subjective representations would pave the way for such a theory. It is, indeed, impossible to reconcile the notion of law as an objective ought with the notion that the rules of law are mere commands by the state. It is an absurdity to maintain that such a command could produce what we call a right and a corresponding duty. If a command is held to give rise to a duty, it must be presupposed that he who issues it has a *right* to command. The »state» cannot, however, create its right to command by its own commands. Therefore, if it is held that the rules of law actually give rise to duties in the usual sense of the word, the state theory of law (i. e., the theory that the rules of law consist of commands or declarations of will by the state) assumes the existence of a Law of Nature empowering the state to impose duties upon its subjects. The state theory would only gain in consistence by being purged from the Natural Law element, which is incompatible with its positivist principles.[5]

Petrazhitsky is not, however, content with the state theory. He rejects it flatly with several powerful arguments. Thus he points out that the law is older than the state; the state exists only at fairly late stages in the history of mankind. For hundreds and even thousands of years before the state made its appearance, there were clans, tribes, and other groups whose life was regulated by law: it would be fantastic, according to Petrazhitsky, to assume that they functioned without any law-norms. Above all, however, *the state is conditioned by the existence of the law*; without law the state is unthinkable. Sorokin says in this respect:

»The very existence of the state already presupposes law.

[5] This is not to say that the state theory would be made tenable by such a purification. I only want to point out that it would be more consistent.

As is shown by Hägerström in his work *On the Question of the Notion of Law* (1917, in Swedish), the exponents of the state theory constantly vacillate between two opposite ideas: on the one hand that the rules of law are nothing but commands or declarations of will by the state or by the actual power-holders, on the other hand that they give rise to rights and duties in the usual sense, i. e., that they have the nature of an objective ought.

So far as the state is an *organized* nation, its existence already presupposes the existence of law-norms that define its territory, its government, its constitution, in brief, its structure and functions. Otherwise neither the boundaries of the state, nor its government, nor the actions of its government and its subjects would be lawful, and there would be no way of determining what norms enacted by this or that group within the state were legal. In brief, without law-norms no state would be possible.»[6]

The law cannot be identical with enactments by a supreme authority (monarch, parliament, etc.); for in many instances, as in the Common Law countries, large parts of the law have been evolved by the courts. Nor can law be an expression of the common will or the will of the people: in the past and present many laws have been enacted without any consultation with the majority of the people.[7]

Petrazhitsky also denies that *sanctions* belong to the essential elements of law; for if a rule X is a legal rule only because there is another rule (X 2) prescribing sanctions in case of infringements, an infinite regress takes place: there must be a rule X 3 prescribing sanctions in case X 2 is violated, etc.[8]

2. *The Reality of Law in a Specific Psychical Experience.*

For the reasons just mentioned Petrazhitsky cannot follow the usual road of positivism. Moreover, when enacted laws are not taken to be the expression of the general will or the will of the state, a code is only an object with certain physical properties, »but paper with some figures in the form of letters».[9] The only possibility left is to place legal phenomena *in the human mind*. »Law is a specific psychical experience» says Petrazhitsky.[10] Timasheff explains Petrazhitsky's »basic proposition» in the following words: »*The reality of law* is of the psychological kind and may

[6] *Interpretations* p. 669.

[7] Sorokin p. 701; *Interpretations* p. 669 f.

[8] Gurvitch I p. 109; Timasheff p. 264 f.

[9] Sorokin p. 701.

[10] Sorokin p. 701.

be found only in specific experiences of individuals.»[11] Outside the human mind law »does not exist as law, but only as a symbol of law which, without a corresponding psychical experience, is incomprehensible and represents a mere combination of various physical phenomena».[12]

The psychical experiences composing law are described by Petrazhitsky as »imperative-attributive» experiences or impulsions, also called »law-convictions». They include both an *ideational* and an *emotional* element. The former element consists of an idea of a certain pattern of action: on the one hand, an idea of a right, belonging to a subject A, on the other hand the idea of a duty in a subject B corresponding to the right of A. »According to Professor Petrazhitsky» Sorokin says »law is imperative-attributive psychical experience, composed of specific emotion plus an idea of a certain pattern of behaviour of the subjects of right and obligation.»[13] This being their nature the rules existing in the mind are felt to be »binding» or »obligatory». The motivation for following them is of a »normative» nature; this motivation is self-sufficient, not inspired by utilitarian considerations. A powerful emotional drive is propelling us »simultaneously to realize unhesitatingly our right and to fulfil unflinchingly our duty».[14] This inner motivation, says Sorokin, and not an apprehension of punishment, is the reason why the millions of people do not murder or kill.[15]

Law-experience differs from moral experience in that the latter is unilateral, i. e., only imperative. Moral rules prescribe a certain conduct, e. g., generosity to the poor, without attributing to anybody a right to claim fulfilment of the duty.[16]

[11] Timasheff, *Interpretations* p. 743. (Italics here.)

[12] Sorokin p. 701.

[13] Sorokin p. 702.

[14] Sorokin, *Interpretations* p. 674.

[15] *ibid.*

[16] Sorokin p. 701 f. The specific psychological traits of law-norms are concisely described by Sorokin in these words, *Interpretations* p. 673: »Schematically these specific traits can be described as follows: (a) an idea of the pattern of action demanded by the law-norm; plus (b) a normative motivation of the respective

Thus »law» is identified with imperative-attributive experiences or impulsions. When Petrazhitsky says that rights, duties, and the like are »phantasmata», he means that they are »projections» into the outside world of such psychical experiences. The reality of law is in the mind of men *ascribing* rights and duties to others, not in the »phantasmata» projected on persons and things with which the impulsions are concerned.[17]

3. *The Scope and Functions of Law-Convictions.*

All imperative-attributive impulsions or law-convictions regardless of their content are law. The scope of law, therefore, is very much broader than is usually assumed. It includes much of what is commonly reckoned as belonging to custom and morals; even rules of politeness or rules of a game are »law», if they are held to confer a right on one party and impose a corresponding duty on another party.[18]

The law-norms, therefore, penetrate into every sphere of life; they constitute our main guide and our main motivating force. All the actions that are performed as a realization of our rights or of our duties are realizations of our law-norms. »We live and act, are born and die, enjoy and suffer in 'the climate of law-norms' (or law-meaning and values).»[19]

The emotional element is strongly emphasized by Sorokin.

> »The law-norms (no matter what may be their content) of all of us are not merely mental patterns of a certain form of conduct but are *living convictions charged with all the emotional, affective, and volitional force that one possesses.* With all the power of these forces, the norm urges us to realize our rights and to perform our duties. If somebody, or something,

actions; and plus (c) powerful emotional (affective and volitional) backing of the actions propelling us simultaneously to realize unhesitatingly our right and to fulfill unflinchingly our duty.» The distinction between the »normative motivation» and the »emotional backing» is not clear to me.

[17] Timasheff, *Interpretations* p. 743.

[18] Sorokin p. 702, Timasheff p. 136, *Interpretations* p. 745.

[19] Sorokin, *Interpretations* p. 676.

opposes the realization of our rights, all the energy of these emotional, affective, and volitional forces becomes at once mobilized to eliminate the opposition, to restore the violated rights and to insist upon their realization.»[20]

But our law-convictions are not only of this far-reaching importance in the life of the individual; they are also »the skeleton, the heart, and the soul of any organized group or institution». The family, the state, the church, and other organizations are »but the objectification and materialization of the respective law-norms and law-convictions of their members or of the strongest part of these. Without such norms none of these organized groups would be possible. Their written or non-written constitution — laws and by-laws — are nothing but the law-convictions of their members or of the strongest part of these».

In regulating the life of society the law-norms or law-convictions perform two great functions: the distributive and the organizational. The *distributive* function implies the establishment of boundary lines between »mine» and »thine», the definition of everybody's rights and duties. But in order to prevent incessant conflict about rights and duties, there is also need for an authoritative agency which can give an interpretation »obligatory for all the parties»; hence, »the judge and the court as agencies which perform this function». They are a mere by-product of the law-norms implicitly given in their distributive function. The *organizational* function manifests itself in the creation of an authoritative power-agency capable of enforcing sanctions, which are inevitable since men are not angels and do not have identical law-convictions.[21] Government, therefore, is a product of the law-convictions:

»Its power consists not in the physical force of the members of the government ...; or in the power of various gadgets which they have (these are operated by many human agents

[20] Sorokin, *Interpretations* p. 674.

[21] *Interpretations* p. 678.

subordinated to them); but in the law-convictions of the members of the group (or of their strongest part) which attributes to the government the right to govern, to legislate, to judge (always under specific conditions), ascribing at the same time to the members of the group the duty to obey its orders. The specified power of a state government over its citizens ... consists exactly in this 'self-imposed obedience' of the members of the group (or of its stronger part) that ascribes to them the respective rights of governing and commanding ... and to themselves the duty of obeying their 'lawful orders'.»[22]

Thus the state theory is turned upside down: the law is not said to be a product of the state; instead, the state is said to be a product of the law, i. e. of the law-convictions.

4. *Divisions of law.*

Petrazhitsky distinguishes between the »official» law of the state and other organizations on the one hand, and »unofficial» law on the other hand. The official law of the state, incorporated in its constitution and statutes, regulates the most important relationships of its members and groups. The same is the case with the official law of other organizations, e. g., of the church. Side by side with the official law of the group and respective organization there always exist, however, systems of unofficial law »either supplementing or correcting or even contradicting the norms of the official law of the group». These unofficial norms, too, vigorously perform distributive and organizational functions within various occupational, professional, and religious groups. In the family also, side by side with its official law, thousands of the relationships of the members are regulated by their unofficial law-convictions. An example of the unofficial law being contradictory to official law is the case of the prohibition law in the United States.[23] Petrazhitsky says that »un-

[22] *Interpretations* p. 678 f.

[23] *Interpretations* p. 679 f.

official law» regulates conditions to a far greater extent than official law.[24]

One naturally asks what place is to be ascribed in this system to legal enactments, precedents, and other so-called sources of law. The answer is that they are »normative facts». By this term Petrazhitsky denotes facts that give rise to ideas of rights and duties, i. e., to imperative-attributive impulsions. He gives a catalogue of such facts, including, besides written laws, e. g., summaries of usages, opinions of prominent jurists, pronouncements by religious and moral leaders, etc.[25]

Petrazhitsky seems to put all such facts, on principle, on the same level; the important thing obviously is that they actually give rise to imperative-attributive impulsions. On the other hand, a norm does not become a law-norm merely because it is on the statute-book; it is no law-norm unless there are corresponding imperative-attributive impulsions in the minds of men.

A law-conviction is not necessarily determined by normative facts; it may also arise spontaneously in the individual mind. Accordingly Petrazhitsky distinguishes between »positive» and »intuitive» law. Positive law is heteronomous, intuitive law autonomous. The distinction is not very clear in available sources. The meaning seems, however, to be that positive law is made up by law-convictions referring to normative facts, while intuitive law consists of other law-convictions.[26] Intuitive law is, therefore, purely individual. Laserson cites Petrazhitsky:

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[24] Gurvitch, II p. 281, cites Petrazhitsky verbally: »Le nombre des cas et des problèmes de conduite qui sont réglés par le droit officiel représente une quantité absolument microscopique par rapport à la multiplicité infinie des cas et des problèmes régis par le droit inofficiel.»

[25] Gurvitch II p. 282; cf. Sorokin, *Interpretations* p. 673: »In many, though not all law-norms, there is an additional element — the reference to the source on which the legality and obligatoriness of the given norm is based», e. g., the official law of the state, the ten commandments, the Declaration of Rights, the opinion of this or that eminent jurist, etc.

[26] Cf. the quotation from Sorokin in the preceding footnote and Gurvitch II p. 282: »Le 'droit positif' est un droit dont la force obligatoire découle des 'faits

»As a principle intuitive law remains individual, individually variable in contents, non-patternized; it may be said that, with regard to the contents of the sum total of intuitive legal convictions, there are as many intuitive laws as there are individuals.»[27]

5. *Critical remarks.*

So much for a brief survey of Petrazhitsky's theory. The criticism against the state theory seems to be convincing.[28] It is also true that *ideas* of rights and duties exist far beyond the scope of legislation and customary law in the usual sense. Moreover, Petrazhitsky and Sorokin seem to be right in stressing the enormous importance of all kinds of such ideas and of the *emotions* connected with them. Some fundamental elements in the theory are, however, open to criticism.

a. *The Search for »the Reality of Law» in the Human Mind.*

To begin with we may ask whether our knowledge is in any way enlarged by identifying »law» with certain psychological facts. This is highly dubious. Our knowledge is furthered, if it is established that rights and duties exist only as subjective representations. But even if that is the real nature of rights and duties, this is no warrant for saying that »the reality of law» is in the human mind. The ideas of rights and duties are certainly realities, and so are the powerful emotions connected with them. But the printed figures in books called codes are also real things; this is, of course, also the case with legislative acts, with courts and prisons, etc. In a naturalistic explanation of the realities covered by the term »law» all these facts and many

normatifs' . . . Les 'faits normatifs' sont des faits dont la représentation dégage un droit positif.» Cf. Balogh p. 79.

[27] *Interpretations* p. 435. Cf. Timasheff, *Interpretations* p. 745: Petrazhitsky means by intuitive law »ideas about just regulation of human reactions, if given in the attributive-imperative form».

[28] Similar criticism has been levelled against this theory by several authors, especially Kelsen and Hägerström.

others have their place; nothing at all is gained by singling out a specific group among them as *the* reality of law. This presupposes, indeed, that the object of research in this field would be to hunt down a mysterious entity called law which is supposed to be hiding in this or that group of facts; while the task actually is to study without preconceived ideas the whole range of facts indicated by the term law.[29]

b. *The Identification of »Law» and »Law-convictions».*

Furthermore, it is pertinent to ask whether Petrazhitsky and Sorokin really hold to the identification of »law» and »law-convictions». If so, the term »law» would denote nothing but the broad stream of ever-changing, purely individual ideas of rights and duties among millions of people.[30] But, at most, what Petrazhitsky calls intuitive law answers to this description. The official law as defined by Sorokin in conformity with Petrazhitsky is of a very different nature; it cannot be reduced to psychical experiences, to »law-convictions». This is evident, e. g., from the following quotation defining the rôle of official law.

> »The law-convictions of different members of an interacting group may be and often are, different, even contradictory. Each party following its own law-norms would chronically clash with other parties whose law-norms were contradictory. No stable or definite distribution of the rights and duties in such a group would be possible. To prevent or to remove such a situation in the group, *the distributive function of law-norms generates ... a set of law-norms that become obligatory and enforced for all the members of the group irrespective of whether the law-norms of certain members coincide or contradict with this 'official law'.*»[31]

[29] Cf. below p. 205.

[30] Cf. Balogh p. 77: »Man wird sich bei Petrazhitskys System damit abfinden müssen, dass die einzelnen Persönlichkeiten ihre individuellen Rechte entwikkeln. Alle Bemühungen zu generalisieren, erweisen sich als unfruchtbar, ja sie sprengen sogar bis zu einem gewissen Grade das vorher aufgebaute System.»

[31] *Interpretations* p. 678.

In the latter part of this quotation one cannot possibly substitute »law-convictions» for »law-norms». Indeed, the official law is contrasted with individual law-convictions. The actual sense of the statement must be that law-convictions generate a set of law-norms (in the usual sense of the word) that become obligatory, irrespective of whether the law-convictions of individuals coincide with or contradict the norms. Moreover, it must be noted that the official law is said to be *obligatory* for all the members of the group. It is clear that Sorokin slips over from the psychological view to the normative: a law-conviction exists or does not exist; it cannot be said to be obligatory.

Further we read:

> »If in a group of interacting individuals such a diversity and oppositeness of law-norms prevails, no order, no peaceful social life is possible. Though each member acts according to his law-norms, perennial conflicts will be unavoidable, since the law-norms are conflicting. Hence the necessity of having in any durable interacting group a set of law-norms that are obligatory for all, and are backed by power and enforced, no matter whether they coincide with or contradict the law-norms of some of the members of the group. *The totality of the law-norms which are obligatory for all members of the group, which are protected and enforced by all the authoritative power of the government of the group or by the group itself make its official law.*»[32]

In the official law of the author it is, indeed, easy to recognize »positive» law as generally understood in jurisprudence. When it comes to explaining what law is, this concept is introduced (without being analyzed): the law is something else than individual law-convictions; it consists of norms obligatory for all, enforced by the authoritative power of the government of the group.

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[32] *Interpretations* p. 679.

c. *The Law-convictions prior to Actual Law?*

When it is held that governmental power and the rules regulating the life of society are a creation of our law-convictions, it must be assumed that these law-convictions exist independently of written and unwritten laws and of their actual application through the organization of the state. It is evident that Petrazhitsky and Sorokin share the common view that a vast complex of »law-convictions» (the so-called »Rechtsbewusstsein») exists by itself, prior to law and law-enforcement; and that legal rules are merely an expression of these law-convictions. This view is, however, erroneous.[33] It is quite true, of course, that new legislation is generally inspired by considerations of justice as well as of expediency. It might also be conceded that the fundamentals of private and criminal law are commonly approved, at least by the more influential sections of the population. But this is not the same as saying that law is an expression of independently existing law-convictions. The following points should be noted.

1) To a very large extent people's law-convictions are immediately determined by the content of the law: this is regarded as right and that as duty *because* the law ordains so. One is, indeed, generally held really to possess a right, if this can be grounded on enacted or customary law. (This is usually the case, even if the law itself is considered to be unjust; as long as it is in force, it is believed to determine people's legal rights and duties.)

2) Our whole outlook on questions of rights and duties is conditioned by our upbringing and generally by influences from the social milieu. Everybody is born in a society where a legal system has existed since time immemorial; there are judges and courts, prisons, police, and other agencies that work according to the set of rules called law. Through the teaching and example of parents, church, and school, and in many other ways, the fundamental rules of the system are transmitted to every new

[33] Cf. the brilliant criticism by V. Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft* I—II (1932—36).

generation, helping to form their view on rights and duties. In its turn, every new generation introduces some alteration to the system while carrying it on to the next generation, etc. Nobody escapes the influence of the law, not even if he (like most people, perhaps) never reads the code of his country or opens a book of precedents; his law-convictions are, nevertheless, to a very great extent formed by the law actually applied in the society where he lives. The law-convictions existing independently of, and prior to, the law are fictitious.

3) It may be true that moral convictions (ideas of right and wrong), and not »an apprehension of punishment», are the immediate motive for criminal acts being generally avoided. But what happens if the threat of punishment is removed, e. g., if the police force is put out of action for a time? A sharp increase in crime inevitably follows, and that within a short time, despite the fact that society is living on its »moral capital», and even if other social agencies partially supplant the police.[34] In reality, the complicated psychological situation leading to the general avoidance of criminal acts is doubtless conditioned by the existence of criminal law and its regular application through the state organs.[35]

B. The Sociological Theory of Timasheff.

Timasheff also tries to define law as a mere fact. Law, he says, is »a social force», active in real social life (4, 10, 19, 132, 267, etc.). It has the function of imposing upon the members of society certain norms or patterns of behaviour (23 seq.). The existence of this force depends on a stable disposition or attitude on the part of group-members towards helping law to be actualized in social life (4). The object of the sociology of law is the system of human actions and reactions through which the norms are enforced upon people.[1]

[34] An interesting study in regard to this is Trolle, *Seven months without a police force* (in Danish, 1945).

[35] I refer especially to Lundstedt's analysis in this respect, *loc. cit.*

[1] The sociology of law, according to Timasheff, does not deal with any par-

In accordance with this trend of thought the analysis is, on principle, concerned with actual ideas and actual behaviour of men. That the law is »in force» means that »combined forces of men stand behind the law» (4). It is in force only in so far as it is supported by a power-structure. The *existence* of law is the same thing as its being »in force» in this sense (219). The being »in force» or existence of law is thus defined as an actual fact. Accordingly a *legal duty* is said to be the mere fact of being exposed to the menace of coercion in case of contrary behaviour. »The situation of having to act under actual or potential coercion (of law) is technically called legal 'duty'» (331).

Timasheff differs from Petrazhitsky at least in three important respects:

1) He rejects Petrazhitsky's conception of law as a »sum of subjective concepts or representations». In opposition to this view he maintains that law is »independent of individual opinions or concepts» (3). He also rejects Petrazhitsky's opinion that legal concepts are »phantasmata» (74).[2]

2) In opposition to Petrazhitsky, Timasheff maintains that coercion is an essential element in the law.

3) A third difference is connected with the second point. In contradistinction to Petrazhitsky, Timasheff accepts the state theory of law, although only for higher stages of social development (281 f.).

1. *Main points in Timasheff's theory of law.*

Timasheff starts from the assumption that the conformity of social life to law is something that can be *observed.* »The triumph

ticular legal system (the English, the French, etc.) but with law as such. It seeks to establish the natural laws for the functioning of legal systems, or, as the author puts it, »to discover 'laws' of a scientific nature concerning society in its relation to law» (19). It is another matter to study human behaviour in society in so far as it is determined by legal rules. The study of this actuality should belong to jurisprudence (27 seq.). The relation between sociology of law and jurisprudence in this regard is similar to the relation between sociology and history (29).

[2] Gurvitch II p. 279 also decidedly rejects this opinion.

of the social force called law (the conformity of human behaviour to legal precepts) is the rule» (4, 6). Thus the law produces similarity in the behaviour of the individuals within a social group (6). In order to give to the law its proper place in the structure of society he enumerates the ways in which uniformity of behaviour is created.

1) Uniformity may depend on *natural* conditions; thus cattle breeding is replaced by agriculture when a certain density of population is attained.

2) Uniformity may depend on *imitation*: a certain way of dressing, for instance, becomes popular.

3) Uniformity may depend on a certain pattern of behaviour being *imposed* on people as binding. »A certain behaviour is 'imposed' on group-members as an obligatory pattern for their behaviour» (8). The uniformity created by law belongs, of course, to the last category.

The imposing of patterns is effected by the activities of certain persons (supporters of patterns). The process of imposing behaviour patterns is called by Timasheff *social coordination.* This is a fundamental concept of his theory of law. The result of coordination is an actual social order (9).

A pattern may consist of a concrete act, or of a series of similar acts. This is the case for example when the soldiers learn to salute in a manner shown them by an officer or when courts decide disputes according to precedents. The pattern may also consist of an »ideal structure» (8, 117). By ideal structure Timasheff obviously means an imagined pattern of behaviour as opposed to a real act (»abstract descriptions of behaviour to which individuals should adjust their conduct», p. 117).

Social coordination takes place, according to Timasheff, in several *different forms*. These may be classified in two ways. First, we may classify them as *ethical* and *non-ethical*. Ethical coordination takes place when the imposition of patterns of conduct on individual wills is accepted by the ethical conviction of the group. A conviction is an ethical one »in so far as its content is the evaluation of human behaviour from a specific view-

point, permitting the application of the term 'duty' to the behaviour which is in conformity with a certain pattern, and of the term 'violation of duty' to the behaviour nonconformable with it» (13). In other cases coordination is non-ethical. Then *fear* is the chief reason for obedience to the rules (13).

Secondly, forms of social coordination may be classified in so far as coordination is effected in a *centralized* or *decentralized* manner. In the first case we find, within a larger social group, a smaller group forming a power-centre. This is *imperative* coordination; the active centre is exercising authority over the passive periphery. In other cases we find *non-imperative* coordination. People have, e. g., to greet acquaintances or to rise in church with the congregation. Here imposition of patterns takes place through mutual influence of individuals of equal standing. Each one is both influencing others and being influenced by them. No exercise of power takes place (14). This is »social pressure», or »socio-ethical pressure» (105 ff.).

Power is exercised through commands and sanctions. *Socio-ethical pressure*, on the other hand, results from the recognition of ethical rules by the group-members, i. e., from the group-conviction that one *ought* to act in a certain way in given circumstances. From such a conviction there follows a »retributive tendency» against persons who do not conform to the rules: a hostile attitude is adopted against transgressors. The pressure is not exercised by »society» upon its members; this is a mysterious idea. What really takes place is *mutual social interaction*: »every group-member influences all the others and every group-member is influenced by all the others» (106).

Thus »*ethics*» and »*power*» are the two great instruments of social coordination. Their different nature is further explained thus:

> »The interaction resulting in giving force to ethical rules is an equal one: in this process everyone plays the same part, imposing the common will on others and feeling this will imposed upon him. Within power-structures, the social inter-

action is an unequal one — the waves of influence run only in one direction» (171).

Ethics and power, however, must come into contact with one another, since they are active in the same social field. A certain relation between them is necessarily created; it may be characterized by antagonism, neutrality, or cooperation. There is antagonism, e. g., when a conqueror tries to root out the moral system of a vanquished people. There is neutrality when the moral system in society is maintained without support of power, while, on the other hand, power carries through certain rules without support from the ethical group-conviction. But ethics and power may also combine, thus forming a higher unity. The efficiency of ethical rules depends partly on the ethical leadership of prominent persons. Leadership, however, in its most pronounced form is dominance, and that is the very essence of power. On the whole, imperative coordination through the exercise of power tends to become, at the same time, ethical coordination through social pressure.

> »Rules of behaviour are created which are simultaneously ethical rules and general commands of an established power-structure. They form a system of human behaviour in society presenting simultaneously the features of efficient ethics and efficient power, of *law* ... Ethics and power are not two coordinated or subordinated phenomena. They may be thought of as two circles which cross one another. Their overlapping section is law» (248).

In other words, legal rules are both ethical and imperative. They are ethical rules, since »every legal pattern of conduct can be expressed in a proposition with the predicate ought to be» (15). At the same time they are supported by a centralized power, exercising a coordinating influence. Law, therefore, is a field where ethics and power cooperate. »*Law is the overlapping part of ethics and power*» (313).

The last sentence includes the central idea of Timasheff's theory of law (270). It is probable, says Timasheff, that the

treatment of law as ethical-imperative coordination covers the main facts which most people have in mind when speaking of law. »Legal order is constituted by patterns of conduct enforced by agents of centralized power (tribunals and administration) and simultaneously supported by a group-conviction that the corresponding conduct ought to be» (17).

In contradistinction to law, custom and morals include only ethical coordination; their rules are not enforced by any power-centre. On the other hand, purely imperative coordination is present when a despotic government, by display of sufficient power, enforces rules which are not recognized by the group-consciousness.

Ethical rules are differentiated into custom, morals, and law. If *socio-ethical pressure alone* supports a system of rules, those rules according to Timasheff, belong to *custom*. Custom has nothing to do with conscience. What is demanded by a customary rule, e. g., the wearing of evening-dress at certain festivities, is only an external behaviour, not any inner conviction that we absolutely ought to behave according to the rule. In other words, no conviction of duty belongs to the sphere of custom.

Morals differ from custom through the fact that »persuasion derived from religious or philosophical systems aid in securing the triumph of ethical rules» (142). All true social morals (as opposed to purely individual ideas of duty), therefore, are connected with great religious or philosophical movements as Christianity, Buddhism, Greek philosophy, and so on (143). But morals are also distinguished by the fact that their rules do not only demand that we act in accordance with them. They also demand »a direct recognition on the part of the actor that corresponding acts ought to be, i. e., an internal conviction of the excellency of the rule». In the case of morals a specific sanction is added to the socio-ethical pressure common to all ethical rules. This is remorse (146); the »voice of conscience plays in morals a rôle analogous to that of power in law» (145).

In opposition to Petrazhitsky, Timasheff, as already men-

tioned, regards coercion as an essential element of law. He characterizes his own theory as an improved version of Austin's. The main point of the Austinian theory is, according to Timasheff, quite true. »The essence of law must be searched for in the manner of imposing patterns of behaviour» (142). Coercion, however, is only one root of the efficiency of law. The other is socio-ethical pressure (141).

Timasheff maintains that the power supporting the law exists independently of the law itself. This is fundamental in his theory. »The possibility to improve the sanction-theory in the described manner depends on the possibility to create a scientifically correct theory of power and to make this theory independent of any knowledge concerning ethics» (143).

Ethics as well as power depend on primary, »irreducible» phenomena. This is the ultimate cause of their independence in relation to each other.

> »Ethics may be efficient without any relation to power; power may exist without any relation to ethics. Both are based upon primary phenomena: the efficacy of ethics — upon group-conviction and the resulting socio-ethical pressure; the efficacy of power — upon polarization, i. e., the creation of large systems of interrelated inborn and acquired tendencies of dominance and submission» (245).

In consequence Timasheff devotes a detailed analysis to the nature of power. The word »*polarization*» is used to denote a natural (causal) law of great importance which is observable as soon as individuals of certain different types are brought into contact with each other. Some of them develop a tendency to command, while others, forming the majority, show a tendency to obey. In this way a relation of »dominance-submission» is created (173). The idea is that a differentiation is necessarily brought about in every human group. A smaller fraction always takes the lead over the majority, the mass. If a crowd of children play together in the street, within five minutes they will have produced one or several leaders (224). This differentiation

depends on a natural classification of the individuals in two kinds: those with high and those with low »dominance feeling». Between them there is an intermediate group (173). The disposition of the mass to follow the signals coming from the leaders is »the very essence of every power-relationship» (177). The tendency to command becomes meaningless if others are not inclined to obey (171).

In the simple power relation, existing as soon as individuals with the two contrasting tendencies are brought in contact, the power of the leaders depends directly on these natural tendencies, that is, on such things as, on the one hand, the capacity and desire to command, on the other hand the inclination to obey. Through mechanization of obedience consolidated power-relations, »power structures» arise; the best example is military drill. Within such structures commands from the centre are, on the whole, obeyed, since the mass has been conditioned to respond to such commands as originate from the centre (178). The tendencies of obedience are strengthened with all possible means; even the name of the leader may be a stimulus »in the tendency of submission» (180). A power-relation where the obedience has been mechanized »is merely a system of acquired tendencies in which the stimuli are represented by words, gestures or symbols of the dominators, and the responses consist of an inhibition of the excitations which otherwise would prevent the execution of the 'indicated' action» (182; cf. 254).

In the minds of men power is generally »objectivated» so that it becomes a mystical phenomenon in itself, something »transpersonal» existing outside man. But this is an illusion. A power structure is nothing but »a complex of behaviour-tendencies and corresponding psychic dispositions in many interrelated individuals» (184). The illusion is created through the fact that every member of the group finds himself surrounded by other members which are conditioned to obey; therefore he lives under such a pressure that he is simply forced to give in. Thus the situation is »transpersonal» *to him*; and it is easy to make the mistake of regarding it as »transpersonal» in an absolute sense

(187), that is, as something existing outside the actual psychical relations.

Specialized power structures often exist side by side without conflicting, namely when they refer to different kinds of human activity, for example a church on one side and a political party on the other. The state is the chief example of a generalized power structure. Potentially it dominates its members in every respect, although the faculty of such domination is not always made use of, e. g., not in a modern democracy (196). In a democratic state a large field is left free for special power structures, which is not the case in a totalitarian state (199).

Every power structure, except the most simple ones, is built up hierarchically (200, 218). In reality, therefore, every power structure is an oligarchy; it is always a rule by a minority. What characterizes the democracies is not so much the structure of the power systems themselves, as the manner in which the leaders are selected (202), particularly that they owe their position to the consent of the others (201).

In the early stages of social development only undifferentiated ethical rules exist. Nothing but a system of customary rules is found. Morals, in Timasheff's sense of the word, can arise only with the creation of religious or philosophical systems. Law, on the other hand, can make its entry only when an organized power structure rises above the heads of the families. This takes place only successively, so that power centres sporadically intervene by means of judicial decisions in order to reinforce by their authority patterns of conduct created by other social forces (279). The rules that are selected for support become legal rules, and are thus differentiated from other ethical rules (283).

No definite line separates the legal and the pre-legal stages (278). The powers interfering in order to support customary rules remain for a long time decentralized: they are chiefs of tribes, feudal lords, ecclesiastical potentates, and so on (284). The modern state with its monopoly of coercion is a relatively late phenomenon. For this reason the »State theory of law» is not generally applicable; it holds good only with regard to later

stages of development: law is older than the state. Since, however, the State theory describes conditions in a modern society, it may be used, as a simplification, in analytical jurisprudence (284).

There is also another reason why the State theory is not generally applicable. A despotic state may enforce a certain system of rules; but these are no rules of law, as they are not ethical, i. e. not supported by the ethical group-conviction. The connection between law and state, therefore, is only natural, not necessary (141).

The difference between despotic rule and »legal order», or lawful rule, is of fundamental importance. Timasheff here adduces the distinction of Stammler: the characteristic feature of legal power is that the commands of the rulers are binding upon themselves (215). The rulers accept the rules, i. e. they act according to them, and so they lose part of their »natural» independence. In other words, they limit their power themselves (259). Timasheff also accepts the doctrine of Jellinek concerning the self-limitation of the state; at least he cites, without criticism, this theory as »the classic theory of the self-limitation of power» (271). Only when power limits itself, do we find true legal order; for only then do we find the combination of ethics and power which is characteristic of law, as distinguished from despotism based on naked power alone.

This theory is used to give a »realistic explanation» of the *constitutional order*. »The constitutional order in a country exists as long as it is recognized by the active power centre» (260). But since the rules of the constitution are to a large extent devoid of legal sanctions, the question arises as to how it can be maintained that they are of a truly legal nature. The existence of socio-ethical pressure alone is not enough. If the constitution is to include legal rules, according to Timasheff's definition of law, the rules must be provided with sanctions executed by organized power. Timasheff gives the following answer to the question: »there is one other sanction also (besides socio-ethical pressure): violating legal rules of the highest order means breaking the

self-limitation of power; and it has already been noted that many motives check a tendency of active power centres to do this» (265). The last words refer to the fact that the consequence may be the destruction of the power-organization through resistance from the people (260).

The problem of *international law* is solved in a similar manner. International law cannot be considered as a complex of legal norms ruling sovereign states from above since there exists no power structure dominating all states. The only possible construction of international law, therefore, is the following, which is based on the self-limitation of states.

> »The State, which could behave quite freely in these relations (in the relations to other states), limits itself; the power holders declare that they will act in a certain way, if one or another condition presents itself. As long as there is proper recognition and support, the corresponding rules are in force and constitute actual international law; if this recognition is withdrawn, the rule ceases to exist as a legal one.»

International law, therefore, is »self-limitation of the state». Complete legal guarantees of its being observed are nowhere to be found. But there are strong actual guarantees: »they consist of the existence of ethical conviction concerning international relations and of the interdependence of the interests of particular states» (261).

2. *Fact and »ought» in Timasheff's theory.*

As already pointed out, it is quite obvious that Timasheff aims at a purely sociological explanation of the nature of law, i. e., an explanation by which the phenomenon called »law» is described as an actual social reality. He says, for instance, that the result of his study has been to reduce the »social force» that law is said to include to »the specific interaction of individual group-members» (267). »Law is an actuality» are his words in another passage.[3]

[3] P. 22. Cf. p. 267, 323, 367.

The same tendency appears, for instance, in the assertion that the *validity* of law is a fact, viz. the fact that a power-organization stands behind the rules. He also describes in a very striking manner the functioning of the legislative machinery and how it happens that new rules are really applied.

> »If a new legal rule is created in forms foreseen by law, it is easily introduced into the behaviour-system forming law. Every time conditions are given which correspond to the if-clause of the new rule, the response foreseen by law is effected almost automatically. These conditions form the 'stimulus-situation' within a new tendency of behaviour built up on already existing ones» (293).

If Timasheff had consistently stuck to his own programme, he would have eliminated every element of objective »ought» and reduced law to mere facts. But in this case he would inevitably have come into opposition with the prevailing opinion in legal philosophy; there is no doubt that law is generally held to include an objective »ought». In Timasheff's book, however, we find no trace of a conscious and fundamental opposition to the prevailing view; this is an indication that Timasheff himself must, indeed, harbour the idea of law as an objective »ought». A thorough examination corroborates this assumption.

In immediate connection with the utterance concerning the functioning of the legislative machinery, Timasheff raises the question what are the external symptoms of a legal rule »in force», i. e. of »a rule to be applied by courts and to be taken into consideration for scientific construction and for practical behaviour in life». Which are, he asks, the distinctive marks, through which a *valid* rule of law differs from other similar phenomena as, e. g., moral and customary rules; from individual, or collective ideas about what law ought to be, etc. (294). In this connexion »validity» cannot signify the fact that the rules *are* actually enforced; whether this is the case or not is ascertained by investigation of the usage of the authorities. Here the question concerns the criterion determining whether a rule *ought*

to be applied by the authorities, which is a very different matter indeed.

The answer is that a valid rule is distinguished by having been created under the conditions foreseen by actual law for the creation of future law (294). This definition is said to be quite sufficient for practical use; but Timasheff adds that it does not give any scientific explanation of the validity of the law. The rules deciding the forms for creating new rules are, of course, legal rules themselves. If their validity depends on their having been created in legal forms, then we must ask for the reason why the rules deciding these forms are themselves valid, and so on; thus we have a *regressus in infinitum* (295).

How, then, are we to attain a scientific explanation of the validity? Timasheff mentions different fundamental principles which have been adduced in order to find a basis for the validity of the law, e. g., its conformity with reason or with the idea of social solidarity. But these explanations are nothing but expressions of the »scientific conviction» of certain individuals and not a social fact. The principles in question can neither be disproved, nor confirmed by the observation of facts. »They are beyond science and belong to the province of the philosophy of law» (296). Legal philosophy, according to Timasheff, is no true science, since its chief task is to be the evaluation of the ultimate aims to be attained by law (30).

The problem why a certain system of rules is actually applied within a group is undoubtedly, from Timasheff's own point of view, a purely scientific question; it has to be solved by means of an investigation into the facts. But the question of the ground for the validity of the law in the sense of its being an objective »ought» can never be answered by science; as is well known, the »ought» cannot be deduced from facts. When Timasheff says that the question of the validity of the law does not belong to science but to the philosophy of law he must have in view »validity» in the sense of »ought»; and it is presupposed that validity in this sense belongs to the essence of law. This means, however, that the sociological conception of law has been

abandoned; without noticing it, the author has slipped over to the normative conception.

Actually Timasheff employs the word »validity» in three different meanings without distinction: 1. Validity = the fact that rules are actually applied. 2. Validity = the fact that a rule has been issued in accordance with law. 3. Validity = that the rule *ought* to be followed.[4]

The lack of distinction between »ought» and fact is connected with the absence of any clear distinction between *ideas* of »ought» and *the objective »ought» itself*. When an idea of an ought is found to exist, the »ought» itself is considered to be present. This appears already in the controversy with Petrazhitsky. Against Petrazhitsky's doctrine that the only reality in what is called law is a series of »subjective representations», Timasheff maintains that law is independent of individual opinions and conceptions. The argument is the following: »Within a certain social group identical patterns of conduct are considered to be legally imposed» (3). This, of course, is no argument against Petrazhitsky's theory unless it be assumed that the rules become legally imposed, in the sense of objectively valid, in the same moment as they are *considered* to be legally imposed. The contention that the law is generally »considered» to be binding cannot be opposed to Petrazhitsky's theory that the only real thing is a series of »subjective representations». Since, however, it is regarded as an argument against Petrazhitsky, the author must confuse the general *assumption* that law is binding with its *being* binding in the objective sense of the word.[5]

[4] It may be remarked in passing that the second definition is quite inadequate for practical purposes.

[5] Cf. p. 74 seq. Here too Timasheff argues against the theory of Petrazhitsky that the objective validity of law and morals is an illusion and that the reality is only certain parallel subjective phenomena in the consciousness of the group-members. In this connection Timasheff says: »This individualistic theory is, of course, completely erroneous. Men are social beings and the content of their consciousness is mostly determined socially. Therefore the list of recognized ethical rules is practically the same for all the members of a certain social group. To be a group-member means, first of all, to share in the group-conviction and to behave

The same confusion is obvious in the following passage (143):

»Morals form a part of ethics and are, therefore, enforced by socio-ethical pressure. Moral rules are obligatory for adult members of a society, in so far as there is a group-conviction concerning these rules. These are assertions which most authors who have dealt with the question would probably contest. Their contention is that morals are autonomous and individual; they consist of rules which an individual freely creates or accepts; he acts according to them not because others consider these rules obligatory, but because he himself considers that they truly express the idea of what is good.

Such opinions are erroneous. Moral rules are obligatory. Social groups consider these rules not as 'recommended' statements which may be recognized or not recognized by group-members, but as social commands which must be carried out, even if they run counter to individual interests or desires. The moral rule 'Do not lie', is imposed upon all group-members.«

That moral rules are binding here implies, on the one hand, only the existence of a group-conviction that they are binding; this is a psychological fact. On the other hand, the binding force of the rules must mean something else: moral rules *are obligatory*, says Timasheff, against the defenders of autonomous morals. From their standpoint, as described by Timasheff, these philosophers, of course, have no reason whatever to contest the fact that the members of society are influencing each other; what they contest is that real duties can be constituted by an

in accordance with it. 'Communities', says Allport, 'are small groups, whose members are governed by modes of conduct they recognize.' Therefore, 'the essence of moral (ethical) conduct is the performance of social duty, duty prescribed by society, as opposed to the mere following of the promptings of egoistic impulses' (MacDougall)» (75). The argument against Petrazhitsky must imply that Timasheff wants to maintain the objective validity of law and morals; in the quotation from MacDougall it is also said that real duties exist, prescribed by society. On the other hand, the objective validity of duty is supposed to be the same thing as the fact that the list of acknowledged ethical rules is practically identical for all the members of a certain social group. If the author stuck to the latter point of view, there would be no difference between him and Petrazhitsky in regard to the question of the objective validity of morals and the law.

external authority. But Timasheff maintains *against this school* that morals *are* binding. The argument rests on a confusion between a *general conviction* that some rules are binding and their being binding in an objective sense.

As we have seen, legal order, according to Timasheff, includes that the rulers themselves are bound by the rules. Here also we find an ambiguity. That the rulers are bound means, on the one hand, only that they recognize the rules by behaving in accordance with them; this is self-limitation of power (259). Consequently the constitutional order of a country exists only as long as it is recognized by the rulers (260). On the other hand, the rules are really binding on them in the objective sense of the word. »Legal rules, like ethical rules in general, are obligatory not only for 'others', but also for those who impose them.» That Timasheff has real duty in mind is confirmed by the reference to Jellinek's doctrine of the self-limitation of power; without doubt it is Jellinek's opinion that the state binds itself in an objective sense.

In order to distinguish despotic rule from legal order Timasheff also quotes Stammler.

> »According to him, the characteristic feature of legal power is that the commands of the rulers remain obligatory for the rulers themselves as long as they are obligatory for subjects. This does not mean that the contents of the commands should be identical for both, but merely that such commands bind both sides as partners, whereas within despotic rule the commands of the rulers do not bind the rulers» (215).

Here it is quite apparent that »obligatory» means objectively binding. The word expresses no socio-psychological fact but an »ought»; and this, of course, is also Stammlers intention.

The difference between legal order and despotic rule is further developed by Timasheff in the following way. The rules of a despotic government are only *technical* rules; legal rules, on the contrary, belong to the *ethical* sphere. Technical rules do not

refer to absolute but only to relative values: the formula »ought to be» is not applicable to them; it is replaced by the notion of what sort of action is necessary to attain a specific aim. A technical rule, for instance, can show how wealth may be increased; ethical rules, on the other hand, show whether the aim of gaining profit may be considered a »right» one or not. »Ethical rules show the conduct that ought to be or ought not to be; technical rules the conduct that is necessary, if a certain aim is to be attained» (82). Thus ethical rules are *binding*, in contradistinction to technical rules, which are only rules of expediency.[6]

The confusion between the »ought» as objectively existing and the ideas concerning the ought runs through the whole book. The author asks, e. g., how a collective *habit* is changed into custom, i. e., into a sort of ethical rule. »How are these habits transformed into customs, sanctioned with the formula 'ought to be' and thus related to the highest values of morality and law?» The purport of the question is: How are the habits transformed from mere facts into an »ought»? The answer is given in the following words (121):

> »There is an irreducible phenomenon called by Jellinek 'the normative tendency of the actual'. Every time a certain situation or practice seems to have become permanently established, the idea arises that it is just as it 'ought to be'. It is well known that logically there is no transition possible from *is* to *ought*. Yet men are not entirely — perhaps not essenti-

[6] It is a mystery how Timasheff under such circumstances can reckon customary rules among ethical rules. Does the rule that one has to wear evening-dress on certain occasions refer to any *absolute* values?

Timasheff also confuses duty in the sense of »ought» and duty in the sense that another behaviour is followed by a sanction. Ethical rules, including legal rules, are said to refer to absolute values and include an objective »ought», while technical rules only show the correct means of gaining a certain end. But a legal duty is also defined as »the situation of having to act under actual or potential coercion (of law)» (331). A rule imposing a »duty» of this kind is, however, according to Timasheff's own definition, a technical rule. It does not refer to any absolute value but merely states what we are to do in order to avoid certain difficulties.

ally — rational beings, and the logically impossible transition is daily effected with great facility.»

There is nothing, of course, logically absurd in the fact that an *idea* of »ought» arises for certain reasons, e. g., because a habit has been well established. The creation of such an idea involves by no means that the logically absurd transition from fact to ought is performed. What is logically impossible, is to base the assertion of an objective ought on inferences from facts. When the author says that the logically impossible transition from *is* to *ought* is daily effected, he must assume that *objective* duties arise with the *ideas* of such duties.

Timasheff gives some striking examples of how actual states gradually come to be regarded as right. Then he says (124 f.):

> »From the sociological viewpoint there is nothing mysterious in this normative tendency of the actual; but for social philosophers, in so far as they are inclined to separate completely the world of actuality from the world of values, the problem is much more difficult, for through the normative tendency a fact becomes a value, or, more exactly, the embodiment of a value. In general, facts *are* evaluated (by history, public opinion, etc.) and values *are* actualized (in scientific discoveries, heroic acts, creations of art). The human mind is, of course, the point where the physical, the psychic and the ideal worlds (values belong to the last of these) meet.»

There is nothing mysterious in the creation of *ideas* that the actual state of things is the right one. But it is a mystery, indeed, how such ideas can give the quality of value to actual facts. To say that the human mind is the point where the physical, the psychic and the ideal worlds meet, is only an evasion. What is expressed by this phrase must be a confusion between value itself and the idea of value.[7]

The confusion between »ought» and fact explains how Tima-

[7] A confusion of the same kind is apparent in the quotation from Petrazhitsky given above p. 169. »The closed, psychic world accessible only to its bearer» is placed in contrast to »the spatio-temporal world». Rights and duties exist, according to Petrazhitsky, only in the former world. This means, however, that Petraz-

sheff can define law as fact — without any sense of fundamental disagreement with prevailing opinion. The author is constantly slipping over to the normative view and, therefore, no fundamental difference makes itself felt.

For the same reason the definition of law as ethico-imperative coordination is ambiguous. Because of the persistent confusion between *fact* and *ought*, it involves, on the one side, that the rules generally are *considered* to be binding, on the other side, that they really *are* binding.[8]

3. *The weakness of the sanctions theory.*

Timasheff tries to refute Petrazhitsky's argument that a legal rule cannot be defined by means of sanctions as this leads to a

hitsky assumes the existence of an ideal world, apart from the spatio-temporal world. If he merely wanted to say that rights and duties exist only as the content of human ideas, no assumption concerning a non-spatio-temporal world would have had to be made.

[8] The lack of distinction between fact and »ought» also leads to the inclusion of fictitious legal theories in the sociological explananation of the law. In a passage quoted above Timasheff says that the state potentially dominates its members in every respect, although the faculty of domination is not always made use of, e. g., not in a modern democracy. Here »the state» is endowed with an unreal power. Would it, e. g., have been possible for the persons who ruled England in 1930 to dominate the British people in every respect, although, for some reason, they desisted from doing so? Of course not. A bill considered to imply some severe infringement upon the freedom of the citizens would, in all probability, have caused a violent crisis. The sphere of actually possible changes in legislation was in fact narrowly limited; then, as always, the power of the rulers was only relative. The potential omnipotence must be the same thing as the legal concept of sovereignty. With regard to international law, Timasheff holds that the states could »behave quite freely» in their international relations. But what government can ever do anything of the sort? Here external sovereignty is taken as a sociological fact. In both cases the unreal concept of power is counterbalanced by the equally unreal »self-limitation» of the rulers of states. »Self-limitation» means abstaining from the use of »sovereign» power potentially held. The actual power held by persons occupying the key-positions in the state organization results from the whole psychological situation in the country and is necessarily from the beginning relative or »limited». If the *idea* of state »sovereignty» prevails at a given time, this is, of course, an element in the situation but nothing more.

regressus in infinitum.[9] He reasons in the following way: The probability of disobedience to a primary legal rule is never great. We may designate it as I : V, where V is a rather large number. The probability of both the primary rule and the secondary rule, which sanctions it, being successively violated must be expressed by the formula $I : V^2$; the probability that three rules would be successively violated finds its expression in the formula $I : V^3$, and so on. In this way the probability becomes so small as to be practically negligible (264).

The argument would be valid only if the frequency of violations of primary rules were independent of the fact that sanctions are applied. A primary rule, in Timasheff's sense, is, e. g. the one forbidding theft; a secondary rule is the one concerning punishment of thieves; a tertiary rule is that judges and other officials who do not perform their duties in this respect shall be punished in their turn. Timasheff now argues as if the probability of violations could be estimated regarding each kind of rules separately. But here he overlooks something. Suppose that the tertiary rules were totally disregarded. In the long run this would inevitably lead to some disregard for secondary rules, i. e., to less efficient enforcement of criminal law. If so, crime would certainly increase, and the probability of all three kinds of rules being successively violated would be great.

The argument of Petrazhitsky cannot be refuted. We are inevitably led to a *regressus in infinitum* if we try to define legal rules by means of sanctions; for the rules concerning sanctions are supposed to be legal rules themselves. The error of the sanctions theory is, in reality, similar to the error of the old belief that the earth was supported by an elephant, standing on the back of a turtle. A firm base for the legal system is sought for and is believed to be found in the use of force; but behind the first force a second one must always be assumed, just as it must be imagined that the turtle is standing on something, and so on *ad infinitum.*

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[9] Cf. above, p. 171.

Quite logically Timasheff arrives at a point where a legal rule is not sanctioned by any other legal rule; this is the case with the rules of constitutional law. It is no legal sanction, in the author's sense, that violation of the constitution may lead to the overthrow of the government. This is said to follow from the conflict between the commands of the rulers and the actual group-conviction. »If purely ethical motivation prevails over the purely imperative one (in cases of violation of constitutional law), then the breach may result in destroying the power structure» (260). This is not a sanction executed by a power-organization; it simply means that socio-ethical pressure causes the downfall of the rulers.

The case of international law is much the same. Here also it is impossible to find any power-organization applying sanctions when the rules are infringed. The actual guarantees of international law consist, according to Timasheff, of influences belonging to the sphere of socio-ethical pressure. »They (the actual guarantees) consist of the existence of ethical conviction concerning international relations and of the interdependence of the interests of particular states» (261).

The infinite regress is cut off only because, at a certain point, socio-ethical pressure alone is taken to be the force behind the rules; the element of sanctions enforced by a power-organization has to be dropped.

6. *Is state power prior to the law?*

Timasheff's theory presupposes that the faculty of coercion exists independently of legal order. But this means that the power-organization using force is prior to legal order.

Timasheff's investigations concerning power are highly interesting. It is only surprising that the author, in spite of his keen insight into these matters, can maintain the opinion that power is prior to the law. At every step in his description of power structures it is assumed that they are built up and function according to a set of rules. Timasheff emphasizes, e. g., that

every power-structure such as the state is a hierarchy; but a hierarchy is always arranged according to rules determining the relations between leaders and subordinates. This is obviously the case with the state organization; the rules for the composition and the functioning of this organization are, however, precisely the rules that we summarize as law.

From Austin's theory Timasheff has taken over the idea that state power is prior to legal order and that the rules of law accordingly can be defined as rules sanctioned by the state. But just imagine if there were no such rules as those called legal rules. Then the whole organization of the state is unthinkable.[10] Government, parliament, and the whole corps of civil servants, consist of persons who have been appointed to certain rôles in the organization according to legal rules; they are salaried according to legal rules; they enjoy general respect in their activity because the rules are generally regarded as binding; they act, on the whole, according to the patterns of the legal rules in so far as there are such patterns for them; and they are obeyed by their subordinates on account of the law, etc. In this connexion it should be pointed out, moreover, that the power of the government and of officials is not only based on constitutional law, but also on those of civil and criminal law. The complicated organization cannot, e. g., be supplied with sufficient resources, unless a certain economic order is maintained, a certain degree of personal security prevails, etc.; but all this presupposes a system of civil and criminal law.

Timasheff would perhaps object that the organization of power is one matter, feelings of duty (in regard to legal rules) and socio-ethical pressure another matter. But the state organization can no more exist without these factors than without rules of law. Is not the state to a large extent based upon feelings of duty in the minds of its officials? But it also depends on socio-ethical pressure manifesting itself in reactions against law-breakers and in many other ways.

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[10] Cf. Sorokin, cited above p. 170 f.

What is called state power (i. e., the power of certain persons in the state organization) results from a general attitude among the population, including respect for the law, disapproval of illegal acts, habitual obedience to prescriptions issued by competent authorities, a specific sense of duty among officials, etc. On the other hand, these attitudes cannot be maintained unless law is actually administered with a certain degree of efficiency. State power, therefore, is inextricably bound up with law. It is not only a question of its being »reinforced» by the support of law; state power exists only if a system of rules for the use of force is both generally respected among the population and consistently applied by the members of the state organization.

All this is evident from an analysis of the actual situation in any civilized country. (For the sake of brevity the exceptional circumstances prevailing during a revolution have been left out of consideration here.) It is an altogether different question, not to be discussed here, how the actual situation has been gradually brought about through a development covering hundreds of years.

The argument may be illustrated by taking any examples from our time. Think of the situation in England in any given year, 1920, 1930, etc. Was it not the case that those who ruled the Empire had attained their positions in accordance with the constitution (i. e., by means of elections, appointment by the King, etc.)? Was it not the case that the general reverence for the constitution was a condition for their power? How could power have been exercised unless an actual order in society had been maintained through regular enforcement of criminal and private law? Power has, of course, other sources too besides the respect for the constitution, e. g., gift for political leadership, forceful oratory, etc. But nevertheless so-called state power, as it actually exists, depends on the legal system and its being deeply rooted in the consciousness of the people. The struggle between political parties is, therefore, primarily a struggle for the legal positions of power.

The contention that law emanates from a power existing prior to the law must, for these reasons, be rejected. As we have seen, governmental and legislative power is conditioned by the existence of a legal system that is generally respected. What the power-holders can do is to introduce partial alterations in the system. But this takes place according to rules of the constitution itself, in virtue of the legislative power conferred upon certain authorities by the constitution.[11]

Timasheff's theory of law is an attempt to combine a psychological theory with the state theory. Therefore his theory is (in the main) exposed to the objections which can be made against the psychological theory, as well as to those which can be directed against the state theory. Timasheff's doctrine, in much the same way as Petrazhitsky's, rests on the assumption that the ideas of rights and duties exist independently of the actually applied legal system. On the other hand, it presupposes, as we have seen, that the power organization exists independently of the system of rules and their actual application. Both assumptions are mistaken.

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[11] The discussion has referred only to what Timasheff calls legal order, not to the case of »despotic government». But the situation regarding the question at issue, is, on principle, the same wherever despotic government obtains. I suppose Louis XIV was a despot in the author's sense. But did he not obtain his position in virtue of the rule of inheritance to the French crown? Was not the principal source of his power the engrained respect for the divine right of the King among the French people? Timasheff says, p. 219: »An order, as a complex of efficient rules, may, even in our days, be not at all an order of law. Efficient rules of domination (general commands of the rulers) determining the character of the power hierarchy may be non-ethical, merely technical rules. In such a case a hierarchical system of powers may remain outside the realm of law. This is the case within the despotic State.» It is at least doubtful whether any state power in our days rests merely on »technical» rules, i. e., rules that do not imply the idea of an ought. This has probably never been the case with the totalitarian states of modern times. The power of their leaders has always been based, for a large part, on the fanatical devotion of their followers to some definite end, which they have had in view.

7. *The question to be answered.*

The definition of law as ethico-imperative coordination is the answer to the question what the unknown X we call law is. The idea is that the unknown X can be identified with something given. This way of defining the question involves, however, a mistake: the unknown X cannot be identified with anything at all, since we do not know what it is. To be able to decide the question of identification we must know the attributes of X. Thus the unknown must be supposed to be known.

When the author raises the question of what the unknown X called law is, he must necessarily have a definite idea of the properties of the unknown X. Only for this reason can he establish, at the outset, that the conformity of social life to law is an observable fact from which the investigation might start. »The triumph of law, i. e., the conformity of human behaviour to legal precepts, is not a postulate, not a desire of well-intentioned individuals, but a fact of social life» (6). Such an assertion could not have been made unless the author had an idea of what law is.

For the same reason, however, the validity of the observation is questionable. If it is held that we can observe »the triumph of law», i. e., the general conformity of behaviour to its rules, it must be assumed that the properties of the rules making up the law can be ascertained independently of their being actually applied in social life. If it be tacitly assumed that only rules that actually, to a certain extent, are governing social life constitute »law», the observation becomes illusory. But it seems, on the other hand, to be quite impossible to define law, regardless of its application, in such a way that we may later be able to state on the basis of observation that rules with the properties indicated in the definition are generally followed in social life.[12]

[12] The author's statement cannot be maintained in the form that it is an observable fact that law, in the sense of legislative acts, generally succeeds in moulding society according to its patterns. The reasons are the following.

C. Is the Sociological Theory of Law Possible?

The question whether it is possible to give a wholly realistic, sociological explanation of the phenomena comprised under the name of law, should, in my opinion, be answered in the affirmative.[1] A condition for success is, however, to avoid sliding over from fact to »ought». The objective ought has no place in such a theory: it cannot be fitted into the context of reality; only our *ideas* of rights and duties and the emotions connected with them are real. *The distinction between legal ideology and objective reality is the key to the sociological explanation.*

The theories discussed here contain important elements of a sociological theory. In connection with this discussion the following points might be stressed:

1) It should now be recognized as an established fact that state-power is not prior to and independent of law. On the contrary, state-power follows from certain relatively fixed attitudes among the people, including their »law-convictions». But these attitudes presuppose the actual application by a power-organization of the rules contained in the constitution and other legislation as well as in customary law.

2) Legal rules cannot be defined as rules, infringements of which entail sanctions. But legal rules are for a large and essen-

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1. The concept of legislation presupposes the concept of law. Only legislative acts which are brought about according to the rules of a constitution that is generally respected have any appreciable chance of becoming effective. Moreover, the constitution cannot exist by itself; it presupposes the relative efficiency of a vast system of criminal, private, and administrative law.

2. It cannot be maintained that, even within such a system, every act of legislation engenders corresponding behaviour of the citizens. Legislators generally pay regard to the question whether a proposed law might be effective or not. In general, they desist from legislating, if it is evidently impossible to attain a certain purpose in this way. If we can establish as a fact that the laws of a certain country have a high grade of efficiency, this does not, therefore, imply that legislation as such necessarily has this effect. The result is conditioned by a correct estimation among the legislative authorities of the possibility of realising social aims by way of legislation.

[1] Cf. my »*Law as Fact*» (1939).

tial part rules *about* the use of coercion by the state organization. Thus criminal law contains patterns of action for judges telling them, in connection with the rules of criminal procedure, under what conditions sentences are to be given. Private law, also, in connection with the law of civil procedure, contains patterns of action for judges, telling them under what conditions damages are to be meted out, property restored, etc. In both cases the efficiency of the decrees of the judges depends on the fact that there exists an organization whose members are prepared to carry out the judgments by inflicting punishments and, in case of need, by execution in civil matters. From another point of view, it is true that both private and criminal law contain patterns of conduct for the general public; but these patterns are the counterpart of the rules for the state organization and owe their effectiveness largely to this fact.

3) Legal rules exist only as subjective representations of patterns of conduct. Legal enactments, codes, textbooks on precedents, etc. are used as media of regularly calling forth uniform ideas of this kind within a certain group.

4) There is a double relationship between the maintenance of the legal system and our ideas of rights and duties. On the one hand, our ideas in this respect are powerfully influenced by the system of rules actually applied. On the other hand, our ideas of rights and duties support the actual order. Socio-ethical pressure and legal coercion condition each other reciprocally and work in conjunction for social order.

5) To a certain extent the rules for the use of coercion by certain state authorities is sanctioned by rules to be applied by other state authorities. The effectiveness of such rules is, however, generally dubious with regard to the highest state organs. Only socio-ethical pressure derived from a prevailing complex of ethical ideas can ensure the harnessing of the enormous potentialities of coercion in a modern state to definite rules inspired by considerations of general welfare and personal security.

Editorial note.

The »Bibliographical notes (XXII)» will be published in the next issue of Theoria.

The
JOURNAL
OF
SYMBOLIC LOGIC

Edited by ALONZO CHURCH and ERNEST NAGEL

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Published quarterly by the

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3: 25 Sw. Kr.

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Printed by
BERLINGSKA BOKTRYCKERIET
Lund 1948